**87 1054**

No. ______



IN THE

# SUPREME COURT OF THE UNITED STATES

October Term, 1987

THE FIRESTONE TIRE & RUBBER CO., et al.,
*Petitioners,*

*v.*

RICHARD BRUCH,
ALBERT SCHADE,
LEONARD A. SMOLINSKI, et al.,
*Respondents.*

# APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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## TABLE OF CONTENTS

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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No. 86-1448

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BRUCH, Richard, CHUBB, John R. and SCHADE, Albert and SCHOLLENBERGER, Richard and SMITH, Ronald R. and SMOLINSKI, Leonard A. In their individual capacities and as representatives of the class of former, salaried, non-union employees of the Firestone Plastics Division which was sold to the Hooker Chemical Division of the Occidental Petroleum Corporation,

*Appellants*

v.

FIRESTONE TIRE AND RUBBER COMPANY and FIRESTONE TIRE & RUBBER COMPANY RETIREMENT PLAN FOR SALARIED EMPLOYEES and FIRESTONE TIRE & RUBBER COMPANY STOCK PURCHASE AND SAVINGS PLAN,

*Appellees*

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On Appeal from the United States
District Court for the
Eastern District of Pennsylvania
(D.C. Civil No. 82-3286)

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Argued December 19, 1986

Before: HIGGINBOTHAM, BECKER, *Circuit Judges* and DUMBAULD, *District Judge**

(Filed Aug. 31, 1987)

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**OPINION OF THE COURT**

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BECKER, *Circuit Judge*.

Three classes of former salaried employees of the Plastics Division of defendant Firestone Tire & Rubber Co ("Firestone") allege that the administrator of Firestone's pension and welfare plans improperly denied them various benefits allegedly due under those plans. The "rub" is that the plan administrator is

* The Honorable Edward Dumbauld, United States District Court for the Western District of Pennsylvania, sitting by designation.



Firestone itself -- which is also the sole source of funding for the plan at issue in Count I. To evaluate plaintiffs' claims we must address important questions about the scope of judicial review of decisions by pension plan administrators on plan participants' claims for benefits.

Proceeding individually, the named plantiffs also contend that the plan administrator did not respond properly to their requests for information. In Count VII of their complaint, these plaintiffs invoke the statutory remedy for that wrong provided in § 502(c) of ERISA, 29 U.S.C. § 1132(c), and ask the court to order defendants to pay each named plaintiff damages of $100 per day.

After concluding that the plan administrator's decision to deny benefits should be reviewed under the deferential arbitrary and capricious standard, the district court granted summary judgment for defendants on all of the counts now before us. We affirm that decision with respect to Counts III and V, but reverse with respect to Counts I and VII.

With regard to Count I, we hold that the decision by Firestone to deny benefits under the Termination Pay plan should be reviewed de novo by the court and that there should be deference to neither the plan administrator's nor the participants' construction of plan terminology. We accordingly remand so that the district court can decide the proper construction of the relevant plan language.

With regard to Count VII, we hold that an individual has standing to request damages pursuant to § 502(c) of ERISA even if he is no longer an employee and is not entitled to any benefits other than those he has already received when he requested information under that provision. Section 502(c) confers wide discretion on the district court, however, to determine how much the claimant should receive in damages. We

remand Count VII to permit the district court to exercise that discretion.

## I. BACKGROUND FACTS AND STATEMENT OF CONTENTIONS

The three plaintiff classes consist of a total of over 500 former salaried employees of the Plastics Division of defendant Firestone Tire & Rubber Co. When Firestone sold its Plastics Division to the Occidental Petroleum Corporation on November 30, 1980, "most if not all" of the class members were offered the opportunity to continue in the positions they had occupied under Firestone. Most accepted. Firestone maintained three welfare or pension plans which are relevant for present purposes.

First, under the Termination Pay plan Firestone provided severance pay to salaried employees under certain conditions discussed in detail below. After the sale of the Plastics Division, plaintiffs requested benefits pursuant to that plan but Firestone denied them. Plaintiffs challenge that denial in Count I.

Second, under the Retirement Plan, Firestone offered defined retirement benefits if employees retired at age 65; it offered other somewhat smaller benefits if employees took early retirement, which they could do under certain limited circumstances. The Retirement Plan also offered deferred vested benefits, which were smaller than either the regular or the early retirement benefit, to employees who could not meet the conditions for either regular or early retirement but who could meet other less stringent conditions. After the sale of the Plastics Division plaintiffs sought early retirement benefits, but Firestone denied their claims and awarded only the lesser deferred vested benefit. Plaintiffs challenge this decision in Count III.

Firestone also maintained a Stock Purchase Plan, under which one class of plaintiffs had been



accumulating stock. When Firestone sold the Plastics Division some of these class members' accumulated stock rights had not vested pursuant to the Plan. In Count V, plaintiffs contend that the sale of the Plastics Division was a partial termination under ERISA, 26 U.S.C. § 411(d)(3), automatically vesting their rights under the Plan on the date of the sale.

Finally, after the sale several of the named plaintiffs wrote to Firestone to request information about their benefits under each of the above plans. Plaintiffs contend that Firestone failed to respond properly to these requests, as required by section 502 of ERISA.[1] That provision also gives participants and beneficiaries a private right of action for damages against the plan administrator if the administrator does not fulfill his § 502(c) obligations. The named plaintiffs who sought information press that right of action in Count VII.

The district court granted summary judgment for defendants on all of the above claims. The court also dismissed several other counts, but plaintiffs do not appeal these decisions.[2]

1. ERISA section 502(c) requires employers to respond within thirty days to requests by plan participants for certain kinds of information. Specifically, § 502(c) incorporates by reference the information producing requirements set out in ERISA § 105, 29 U.S.C. § 1025. That provision requires plan administrators to tell participants and beneficiaries the total amount of their accrued benefits and "the nonforfeitable pension benefits, if any, which have accrued, or the earliest date on which benefits will become nonforfeitable." 29 U.S.C. § 1025(a)(1) and (2).

2. Count II, which alleged that a partial termination of the Retirement Plan had taken place, was withdrawn by stipulation; it later became the gravamen of another lawsuit, *Sikora v. Firestone Tire & Rubber Co.*, which has since been settled. Count IV, which sought return of employee contributions to the Retirement Plan, was also withdrawn by stipulation. Count VI, in which plaintiffs sought credit for vacation time accrued but not yet taken, remained

At the heart of the district court's opinion granting summary judgment on Counts I, III and V was the court's deference to decisions by the plan administrator. In each case the administrator based its denial of claims on a construction of plan language. The district court believed that it could not reverse the administrators' constructions of the plans' terms unless they were arbitrary and capricious, and it felt obliged to uphold the administrator's decisions given that standard of review.

At the core of the plaintiffs' challenge to the district court's decision is their contention that the district court should not have applied the arbitrary and capricious standard in this case. We now address that contention.[3]

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in the case throughout the district court proceedings. The district court granted summary judgment for Firestone on that Count, and plaintiffs have not appealed that decision.

3. Defendants argue that the propriety of the arbitrary and capricious standard was not properly challenged in the district court and therefore that the issue cannot be raised on appeal. We reject this contention for two reasons.

It is true that the plaintiffs did not argue in the district court in terms that the arbitrary and capricious standard was inappropriate. But while plaintiffs accepted the label, they did disagree with the defendants in the district court about the amount of deference which the court should accord the plan administrator's decision. We therefore think that the substance of the question of deference was sufficiently raised in the district court.

More importantly, the decision challenged in Count I is based entirely on the plan administrator's construction of a certain key term. We find ourselves unable to decide whether that construction should resolve the case -- a question which even the defendants want us to answer -- without deciding how much deference should be accorded the plan administrator's decision. We therefore must decide the proper scope of review.



## II. SCOPE OF REVIEW

### A. *Plaintiffs' Contentions*

Plaintiffs argue that both the common law of trusts and federal common law developed pursuant to ERISA counsel against deferring to decisions by fiduciaries with interests adverse to those of the claimants. Such a conflict can occur, for example, if the employer is the plan administrator and the plan provides that the employer's contributions in a given year are determined by the cost of satisfying plan liabilities in the prior year. Or, as in this case with respect to Count I, a conflict of interest may occur if the plan administrator is also the employer and the plan is unfunded, so that any benefits provided by the plan are paid directly by the employer out of its general corporate funds.

Plaintiffs advance two arguments to justify rejection of the arbitrary and capricious standard, and though these theories are based on different legal principles they produce essentially the same result. First, plaintiffs argue that the principles of trust law should control, that under trust law the plan adminstrator owes the employees a fiduciary duty, and that courts enforce that duty by construing all plan language "solely in the interest of the beneficiary." Plaintiffs argue further that the sole benefit standard requires courts to construe all ambiguities in plan language in favor of the beneficiaries, and in favor of coverage.

Alternatively, plaintiffs argue that contract law controls, that the welfare plan at issue in Count I is a unilateral contract drafted by defendant Firestone, and that the principles of contract law require that ambiguities be construed against the draftsman. The result under this theory is also to construe ambiguities regarding coverage in favor of the employee or former employee requesting benefits.

B. *Current Law on the Scope of Review*

The clear weight of authority under ERISA is against the plaintiffs' position. As defendants correctly note in their response to plaintiffs' argument, most courts of appeals have applied the arbitrary and capricious standard when considering challenges to plan administrators' denial of benefits. *Kosty v. Lewis*, 319 F.2d 744 (D.C. Cir. 1963); *Miles v. New York State Teamsters Conference*, 698 F.2d 593 (2d Cir. 1983); *Holland v. Burlington Industries*, 772 F.2d 1140 (4th Cir. 1985), affirmed mem. as *Brooks v. Burlington Industries*, 106 S.Ct. 3267, cert. denied as *Slack v. Burlington Industries*, 106 S.Ct. 3271 (1986)[4]; *Dennard v. Richards Group, Inc.* 681 F.2d 306, 314 (5th Cir. 1982); *Varhola v. Doe*, 820 F.2d 809 (6th Cir. 1987); *Blakeman v. Mead Containers*, 779 F.2d 1146 (6th Cir. 1985); *Pabst Brewing Co. v. Anger*, 784 F.2d 338 (8th Cir. 1986) (per curiam); *Dockray v. Phelps Dodge Corp.*, 801 F.2d 1149 (9th Cir. 1986); *Anderson v. Ciba-Geigy Corp.*, 759 F.2d 1518 (11th Cir. 1985).[5]

4. A summary affirmance by the Supreme Court has precedential value, see Robert L. Stern, et al., *Supreme Court Practice* 287 (6th ed. 1986). But the petition for certiorari which the Court granted, and with respect to which it affirmed, presented only the question whether ERISA preempted state regulation of the severance plan. See 54 U.S.L.W. 3237 (1986). The summary affirmance in *Brooks* therefore does not affect the question of scope of review.

A second petition for certiorari was also filed in this case, which did ask the Court to rule on the propriety of the arbitrary and capricious standard. See *Slack v. Burlington Industries*, 54 U.S.L.W. 3470. That petition was denied, see 106 S.Ct. 3271 (1986); such a decision, of course, has no precedential weight.

5. This Court has not taken a position on this issue. We have held:

> When the amount of benefits to which a distinct group of beneficiaries is entitled [is at issue], pension trustees must necessarily strike a balance between the interests of the beneficiaries who are members of this group and beneficiaries who are not. . . . Because the trustees in these circumstances must reconcile competing interests of different beneficiaries, the trustees' choice cannot be said to violate their fiduciary duty unless it is arbitrary and capricious.



Most of these courts -- though, as we discuss below, not all -- have applied this standard without stopping to ascertain whether the plan's funding obligations gave the plan administrator an interest adverse to the claimants with respect to the question whether benefits should be paid.

The arbitrary and capricious standard has not been applied unanimously, however, or without misgivings. First, recognizing the possibility that an interested decisionmaker's bias may prejudice him against the claimant and thereby deprive the claimant of an impartial hearing, this Court has explained in detail why it refused to defer to decisions made under ERISA by such fiduciaries.

In *Struble v. New Jersey Brewery Employees' Welfare Trust Fund*, 732 F.2d 325 (3d Cir. 1984), we declined to apply the arbitrary and capricious standard when reviewing a decision by plan administrators to return to the employers money which the employers had paid to fund a specified level of employee benefits. The beneficiaries alleged that if the trustees had fulfilled their duty to act "solely in the interest of the beneficiaries," ERISA § 404, 29 U.S.C. § 1104, they would have used the excess to purchase more benefits for the employees rather than returning the surplus to the employers. We held that when beneficiaries sue claiming that plan fiduciaries "have sacrificed the interests of the beneficiaries as a class in favor of some third party's interests," reviewing courts must "apply

the strict statutory standards of ERISA" rather than "the more deferential 'arbitrary and capricious' standard." 732 F.2d at 333-34.[6]

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*Edwards v. Wilkes Barre Publishing Co. Pension Trust*, 757 F.2d 52, 56 (3d Cir. 1985), quoted with approval in *Northeast Dep't ILGWU v. Teamsters Local No. 229*, 764 F.2d 147, 163 (3d Cir. 1985). See also *Gaines v. Amalgamated Insurance Fund*, 753 F.2d 288 (3d Cir. 1985) (applying arbitrary and capricious standard without noting whether or not plan was established pursuant to § 302, but where propriety of arbitrary and capricious standard was not challenged).

We explained in *Struble v. New Jersey Brewery Employees' Welfare Trust Fund*, 732 F.2d 325, 333 (3d Cir. 1984), however, and reiterate in this opinion, that while the arbitrary and capricious standard should be applied only when the trustee is choosing among beneficiaries: when one of the possible beneficiaries of the trustee's decisions is the trustee himself, this degree of deference is inappropriate.

6. A number of cases, both in and out of the pension context, rely on similar principles. One such case in the pension area is *Teamsters Local 115 v. Yahn & McDonnell, Inc.*, 787 F.2d 128 (3rd Cir. 1986), affirmed without opinion by an equally divided Court, 55 U.S.L.W. 4662 (1987). There we struck down one part of the arbitration provisions of the Multiemployer Pension Plan Amendments Act because it violated the due process clause of the Fifth Amendment. Pursuant to MPPAA, plan trustees -- who had a fiduciary duty to maximize the value of the plan's fund -- decided the amount owed to a Multiemployer Pension Plan by an employer withdrawing from the plan. In subsequent challenges to the trustees' decision the trustees' determination was to be presumed correct, and reversed only if the withdrawing employer could show "by a preponderance of the evidence that the determination was unreasonable or clearly erroneous." 29 U.S.C. 1401(a)(3)(A). We held the statute unconstitutional because according this presumption of correctness to the decision of an interested party deprived the withdrawing employer of a fair hearing. 787 F.2d at 142.

A line of California cases relies on the same principle. In *Graham v. Scissor-Tail, Inc.*, 28 Cal. 3d 807, 171 Cal. Rptr. 604, 623 P.2d 165 (1981) the California Supreme Court held an



Second, even some courts that apply the label "arbitrary and capricious" to describe the scope of their review in fact subject plan administrators' decisions to more rigorous review than that normally accorded under the arbitrary and capricious standard under certain circumstances, especially when the plan administrator possesses an adverse interest. A line of cases in the Ninth Circuit provides one example. In *Harm v. Bay Area Pipe Trades Pension Plan Trust Fund*, 701 F.2d 1301, 1305 (9th Cir. 1983) (citations omitted), the court held that if a plan provision excludes a "disproportionate number" of participants from benefits, "the burden shifts to the trustees to show a reasonable purpose for the exclusion." Similarly, in *Jung v. FMC Corp.*, 755 F.2d 708, 711-12 (9th Cir. 1985), the same court construed the arbitrary and capricious standard to provide:

> Where, as here, the employer's denial of benefits to a class avoids a very considerable outlay [by the employer], the reviewing court should consider that fact in applying the arbitrary and capricious standard of review. Less deference should be given to the trustee's decision.

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arbitration agreement unconscionable, and refused to enforce it, because it designated as arbitrator a member and former official of the labor union of which one of the parties was a member. This principle, however, was not offended in *Dryer v. Los Angeles Rams*, 40 Cal.3d 406, 220 Cal. Rptr. 807, 709 P.2d 826 (1985), because the panel which served as arbitrator was composed of two members representing one side and two representing the other. See also *In re Cross & Brown Co.*, 167 N.Y.S.2d 573 (App. Div. 1957), which declined to enforce an arbitration agreement between a real estate broker and his employer because it appointed the employer's Board of Directors as arbitrator. The court held that such an agreement contravenes the "well-recognized principle of 'natural justice'" that "a man may not be a judge in his own cause." Id. at 575.

Finally, in *Dockray v. Phelps Dodge Corp., 801 F.2d 1149*, (9th Cir. 1986) the court defined the standard of review with great care, shaping it in response to "the countervailing tugs of divided loyalty pulling" at the plan administrator.

> At the time that Administrator/Employee Benefits' Director McGowan denied Dockray's pension application [a] strike [against the employer] had entered its third month. The strike had been unusally bitter and violent. The Governor of Arizona had sent National Guardsmen to protect replacement workers as they crossed the lines of massed pickets outside the mine gates. Scuffles, property damage, vigilante violence, and numerous arrests had attracted national media attention to the dispute. For Dockray to "win" his pension would no doubt have boosted the strikers' morale at a time when Phelps Dodge had apparently succeeded in overcoming the picketing and had fully staffed the mine with replacement workers. Given this highly charged atmosphere, we think it unrealistic to grant the same substantial deference to the consideration of Dockray's application by an administrator who is also a senior member of Phelps Dodge management as we would to the decision of a wholly independent fund trustee in similar circumstances.
>
> On remand, the burden of persuasion, of course, remains with Dockray. To prevail, Dockray must show that the Administrator breached his statutory fiduciary duty to act "for the sole and exclusive benefit" of the fund's beneficiaries, including Dockray. 29 U.S.C. § 186(c)(5). The court will weigh the Adminstrator's rebuttal of Dockray's evidence of bias against the arbitrary



> and capricious standard. However, the district court should be appreciably more critical of the reasons advanced by the Administrator, and less willing to resolve all ambiguities in the Administrator's favor, than the court would be if the fund were administered by an independent trustee.

801 F.2d at 1152-53 (footnote omitted).

Similarly, in *Dennard v. Richards Group, Inc.* 681 F.2d 306, 314 (5th Cir. 1982) the Fifth Circuit held that whether a plan administrator's interpretation of a term is arbitrary and capricious turns, inter alia, on the "legally correct" meaning of the term. The Fifth Circuit also emphasized that the facts of a particular case should influence the district court reviewing a plan administrator's decision. On remand, therefore, the district court was instructed to consider the "factual background of the determination by a plan and inferences of lack of good faith, if any." 681 F.2d at 314.

We believe that these cases reflect significant dissatisfaction with the arbitrary and capricious standard when the employer can profit from its decision to deny benefits. We also believe, however, that the propriety of the standard depends on the context in which it is used. In particular, we think it important to distinguish between the standard's use under some ERISA plans and its use in review of decisions made by trustees of plans established pursuant to § 302(c) of the Labor Management Relations Act, 29 U.S.C. § 186(c). We can explain this distinction best by tracing the development of the arbitrary and capricious standard. As the discussion in Part I C shows, the standard reached ERISA after it was adopted from the common law of trusts by courts construing the LMRA. The safeguards present in the

LMRA distinguish that context from many administrative decisions made under ERISA and indicate that the standard should apply in only some ERISA contexts.

C. *The Origin of the Arbitrary and Capricious Standard*

The arbitrary and capricious standard governs judicial review of plan adminstrators' decisions in pension plans set up under § 302(c)(5) of the Labor Management Relations Act, 29 U.S.C. § 186(c)(5), see e.g., *Wolf v. National Shopmen Pension Fund*, 728 F.2d 182 (3d Cir. 1984), and courts appear to have imported the standard into ERISA by analogy to cases concerning LMRA plans. As we explained in *Struble*, 732 F.2d at 333:

> The "arbitrary and capricious" standard derives from section 302(c)(5) of the LMRA. That section imposes a duty of loyalty on section 302 trustees by permitting employer contributions to a welfare trust fund only if the contributions are used "for the sole and exclusive benefit of the employees. . . . " Section 1104 of ERISA imposes a similar duty of loyalty, and not surprisingly the courts have applied the "arbitrary and capricious" standard under ERISA as well.

See, e.g., *Music v. Western Conference of Teamsters Pension Trust Fund*, 712 F.2d 413 (9th Cir. 1983). The LMRA cases, in turn, borrowed principles from the common law of trusts -- a body of law which also formed the basis for ERISA itself. We therefore begin our analysis with a brief review of the relevant trust law doctrines.

The paradigmatic common law trustee must act solely for the benefit of the beneficiaries. Restatement (Second) of Trusts § 170. If the settlor of the trust



instructs that the trust assets be distributed among the beneficiaries, without prescribing the method for doing so, he perforce relies on the trustee's discretion to determine how the allocation should be made. Courts therefore respect the allocation decision unless it constitutes an abuse of discretion. See id. § 187, which provides:

> Where discretion is conferred upon the trustee with respect to the exercise of a power, its exercise is not subject to control by the court, except to prevent an abuse by the trustee of his discretion.

Comment (g) to Restatement § 187 explains, however, that courts will not defer to a trustee's judgment when a conflict of interest threatens the trustee's impartiality:

> *g. Improper motive.* The court will control the trustee in the exercise of a power where he acts from an improper even though not a dishonest motive. . . . In the determination of the question whether the trustee in the exercise of power is acting from an improper motive the fact that the trustee has an interest conflicting with that of the beneficiary is to be considered.

Building on these trust law principles, the Labor Management Relations Act created a framework within which employers could set up pension plans for their unionized employees. Under § 302(c)(5) of the LMRA, however, "employees and employers [must be] equally represented in the administration of [the pension or welfare] fund." The LMRA sets out elaborate requirements intended to protect the plans it authorizes from control by a party biased toward either the employees or employer.[7]

7. Section 302(c)(5)(B) provides as follows:

in the event the employer and employee groups deadlock on

The arbitrary and capricious standard was first used under LMRA plans in a line of cases in the district court for the District of Columbia (and subsequently approved by the D.C. Circuit). These cases have two themes.

First, the courts discussed the impartiality of the LMRA decisionmakers, and they relied on that impartiality in settling on the arbitrary and capricious standard. Second, the cases also attempted to determine whether an employee's interest in his pension benefits was contractual or equitable. If the former, these first courts believed, then judicial review of an administrator's decision would be de novo, as would a court's review of a standard breach of contract claim. If the interest was equitable, however -- as is a beneficiary's interest in his right to receive benefits pursuant to a trust -- then the court would be more deferential.

Both of these themes reappear in the current debate about the appropriate scope of review under ERISA. It will therefore be helpful to review these early cases in some detail.

The first court to address these questions was *Van Horn v. Lewis*, 79 F. Supp. 541 (D.D.C. 1948), decided approximately a year after the passage of the LMRA. There the employer Trustee of a § 302 plan challenged the Trustees' decision to set benefits at a particular level. The district court noted that the LMRA divided

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the administration of such fund and there are no neutral persons empowered to break such deadlock, such agreement [must] provide[] that the two groups shall agree on an impartial umpire to decide such dispute, or in event of their failure to agree within a reasonable length of time, an impartial umpire to decide such dispute shall, on petition of either group, be appointed by the district court of the United States for the district where the trust fund has its principal office.



power equally between employer and employee representatives, holding that the plan "specifically gives each Trustee equal power both in the establishment of the Fund and its administration." For this reason and because the plan was "a benefical Fund, and the rules applicable to charitable trusts undoubtedly apply," the court held that "the majority of the Trustees have a right to act" so long as their decision is not "improper, unbusinesslike, or not in accordance . . . with the letter and the spirit of the Labor Management Relations Act." Id. at 544.

In *Hobbs v. Lewis*, 159 F. Supp. 282 (D.D.C. 1958), the de novo approach surfaced for the first time. There the court reviewed a plan administrator's denial of benefits. The Pension Plan relied on *Van Horn* to contend that "the Fund is a charitable trust" and therefore "that the court cannot interfere in its decisions unless the Trustees act arbitrarily or unreasonably." The district court rejected that contention, however, holding:

> In the first place, I do not agree that this Fund is a charitable trust, involving mere gratuities, but am of the opinion that money paid from [the plan] is in the nature of a fringe benefit, a term of recent origin, or deferred, contingent compensation which the employees of signatories may be entitled to receive in addition to their wages, and which was procured for them by their bargaining agent, the United Mine Workers of America. . . . An employee therefore has a contractual right to this pension if and when he comes within the regulations prescribed by the Trustees.

159 F. Supp. at 286. The Trustees also pointed to a term in the Trust agreement "which grants them full authority in respect of coverage, eligibility, amounts of

benefits, etc." Id. The district court construed this clause to grant the Trustees

> the right to set up requirements for eligibility, etc., which they have done . . . and to pass upon applications for pension when made and determine whether they come within the requirements. However, I do not believe it comprehends the deprivation of an applicant's right of recourse to the Courts when he disagrees with the determination of the Trustees on this point, regardless of whether they acted arbitrarily or unreasonably.

Id.

The debate continued in *Ruth v. Lewis*, 166 F. Supp. 346 (D.D.C. 1958). There the trustees pointed to language in the plan document making them responsible for the decision whether to grant or deny benefits, and they contended that this language committed the benefits decision entirely to their discretion, so that there could be no judicial review at all. The district court disagreed, holding

> This Court is of the opinion that despite the contractual provisions in the trust instrument giving absolute discretion to determine eligibility to the fund, judicial review does lie where applicants can show a breach of fiduciary trust, fraud or arbitrary action.

166 F. Supp. at 349 (footnotes omitted).[8]

8. In so holding the district court applied the principle articulated in § 187 of the Restatement (Second) of Trusts:

> Where discretion is conferred upon the trustee with respect to the exercise of a power, its exercise is not subject to control by the court, except to prevent an abuse by the trustee of his discretion.

See text above, typescript at 16.



Judge Holtzoff, writing in 1960 in *Kennet v. United Mineworkers of America*, 183 F. Supp. 315 (D.D.C. 1960) still found the question vexing. He began his answer by noting that the LMRA "authorized the establishment of welfare funds by employers for the sole and exclusive benefit of the employees of the employer and their families and dependents," and that "[t]he statute further provided . . . that the employees and employers were to be equally represented in the administration of th[e] fund." Id. at 316. He then presented the trust law reasoning relied upon by *Ruth v. Lewis*:

> In effect, we are confronted with a trust fund governed by three trustees and a large groups of beneficiaries of the trust fund. One of the principal branches of equity jurisprudence has traditionally been the protection of the rights of beneficiaries of trust funds. A beneficiary of a trust fund is entitled and has always been entitled to have recourse to a court of equity to secure the proper performance of the duties of the trustees and his rights in the fund. Consequently, on this ground alone the Court would have the power to determine the plaintiff's legal rights in the fund and the correctness of the action of the trustees in denying him a pension.

183 F. Supp. at 317.

Judge Holtzoff then set out the contractual approach to the problem before him, which is much akin to the argument made before us by the plaintiffs here:

> There is another approach to this problem. Contrary to the argument of defendant's counsel, the payments made from the fund are not gifts or gratuities. The employer, in making payments into

> the fund, is not making a gift. This fund was established pursuant to a contract between the union and the employers governing the terms of employment. Payments into the fund are part of the compensation received by the employee over and above his weekly wages. The services rendered by him are the consideration for both his wages and his pension. . . . The employee may be regarded as a third party beneficiary to a contract. . . .
>
> The Court concludes, therefore, that recourse to judicial action may be had to enforce rights under this fund and in such an action the Court will review the legal rights of the plaintiff and determine whether any erroneous decision has been reached by the trustees on questions of law. It will also review, to a limited extent, decisions of the trustees on questions of fact; certainly whether there is any substantial evidence sustaining the decision on questions of fact. . . . Finally, and it is not denied that this may be done, the Court will review the question of whether the action of the trustees is in any way arbitrary or capricious.

Id. at 317-18.

In reliance on this line of cases the District of Columbia Circuit settled on the arbitrary and capricious standard for review of decisions by plan administrators in § 302(c) plans. See *Danti v. Lewis*, 312 F.2d 345 (D.C. Cir. 1962); *Kosty v. Lewis*, 319 F.2d 744 (D.C. Cir. 1963). This circuit subsequently did likewise. See *Gomez v. Lewis*, 414 F.2d 1312 (3d Cir. 1969).

D. *Application of the LMRA Rule Under ERISA*

The first ERISA cases to invoke the arbitrary and capricious standard did so without any discussion of



the differences between the LMRA and ERISA contexts. See, e.g., *Bayles v. Central States Pension Fund*, 602 F.2d 97, 99-100 and n.3 (5th Cir. 1979); *Bueneman v. Central States Pension Fund*, 572 F.2d 1208 (8th Cir. 1978). So have most subsequent cases. We believe, however, that in applying the common law of trusts under ERISA courts must be cognizant of the features that distinguish the ERISA arrangements from the paradigmatic common law situation. Both ERISA and the LMRA permit the trust form to be used by employers for the benefit of their employees even though -- since they deal with each other at arms' length, like buyers and sellers of any other commodity -- there will sometimes be conflicts of interest between those two groups. This difference does not prevent the trust form from being used, but it does require that trust principles not be applied mechanically in the new context.

In their oversight of a trust where the impartiality of the trustee had been carefully assured, the LMRA courts could easily adopt the principle of trust law applicable with respect to judicial review of an impartial trustee's execution of his duties. At least one court has done so in explicit reliance on § 187 of the Restatement of Trusts. See *Brune v. Morse*, 475 F.2d 858, 860 n.2 (8th Cir. 1973). Because the LMRA's precautions assure that the plan administrator will be neutral, it is easy to understand why the courts adopted this rule for judicial review of decisions made in the administration of an LMRA plan.

In the unfunded pension plan at issue in Count I of the complaint in this case, however, there is no assurance of the trustee's impartiality. The plan is controlled entirely by the employer, not by a group evenly divided between employer and employees. Because the plan is unfunded, every dollar provided in benefits is a dollar spent by defendant Firestone, the

employer; and every dollar saved by the administrator on behalf of his employer is a dollar in Firestone's pocket. As we have already seen, the principle articulated in § 187 does not govern judicial review of such a trustee's decisions.

Two rationales are most frequently advanced to justify deference even in this context to fiduciaries' decisions. The first is that they have more expertise than judges in the management of pension plans; the implication is that the fiduciary whose decision is deferred to is more likely than the judge to have answered correctly the question about the meaning of the plan's term. See *Berry v. Ciba-Geigy Corp.*, 761 F.2d 1003, 1006 (4th Cir. 1985) (preferring the decision of plan admininstrators, "whose experience is daily and continual, [over that of] judges whose exposure is episodic and occasional;" see also *Ponce v. Construction Laborers Penion Trust*, 628 F.2d 537, 542 (9th Cir. 1980) ("trustees are knowledgeable of the details of a trust fund (both its purpose and its operation), and thus they are in a position to make prudent judgments concerning participant eligibility.)"

We reject this rationale for two reasons. First, in the context of claims for benefits, the questions which courts must address do not usually turn on information or experience which expertise as a claims administrator is likely to produce. As in this case, the validity of the claim is likely to turn on a question of law or of contract interpretation. Courts have no reason to defer to private parties to obtain answers to these kinds of questions.[9] Secondly, as we have explained, there is a significant danger that the plan

9. This is to be contrasted with, for example, a decision about how to invest plan funds. Deference in that context is entirely



administrator will not be impartial. The lack of impartiality offsets any remaining benefit which the administrators' expertise might be thought to produce.[10]

Another rationale for deference is also commonly advanced -- that courts should not interfere in the trustees' decision to aid one group of beneficiaries at the expense of another. We agree that deference to that kind of decision is entirely appropriate. *Struble*, 732 F.2d at 333 (upholding use of arbitrary and capricious standard where issue is "whether the trustees have correctly balanced the interests of present claimants against the interests of future claimants"). The same degree of deference should be accorded to investment decisions made by plan administrators, so long as a conflict of interest is not alleged.[11] As we explained in

appropriate so long as the fiduciary makes no investment in the employer's business or commits some other, similar abuse.

It should be noted that we also do not deal here with a determination of fact by a plan administrator. We leave for another day the definition of the context, if any, in which courts should defer to such a determinations.

10. It has also been argued that deferring to the administrator's decision will make proceedings faster. We acknowledge that But because the speed is attained by sacrificing the impartiality of the decisionmaker, we think that it comes at too great a cost.

11. Our decision today is also not meant to address the scope of judicial review accorded a plan administrator's decision to change the terms a plan, by offering different or fewer benefits. See *Baker v. Lukens Steel Co.*, 793 F.2d 509 (3d Cir. 1986). An employer's freedom to alter the terms on which it offers employee compensation may well be broader than its discretion to construe those terms while they remain unchanged -- and after they have induced reliance, as the terms of employment normally will.

*Struble*, however, and as the discussion of the common law principles also makes clear, deference is inappropriate to the extent that the party who is alleged to have benefited from the challenged decision is not a beneficiary. Id. at 333-34 (arbitrary and capricious standard should not be applied where issue is whether "they have sacrificed valid interests to advance the interests of nonbeneficiaries" and noting that the employer is not a beneficiary). Here, of course, the employer -- who also made the decision -- is the party who benefited from the denial of benefits.

Even the cases from other circuits adopting the arbitrary and capricious standard have allowed plaintiffs to show that the plan administrator was influenced by some special kind of improper motive, though they begin with the presumption that the plan administrator was impartial. In light of the incentives facing employers we think that both common sense and the principles of trust law require rejection of that presumption.

E. *The Standard to be Applied Here*

The principles of trust law instruct that when a trustee is thought to have acted in his own interest and contrary to the interest of the beneficiaries, his decisions are to be scrutinized with the greatest possible care. "Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty" which governs a trustee in the execution of his fiduciary duty. *Meinhard v. Salmon*, 249 N.Y. 458, 464, 164 N.E. 545, 546 (1928). *Struble* applied this standard to review a decision about how to use surplus plan assets.

This rule would suggest that any ambiguity in the trust document should be resolved in favor of the beneficiaries, and that is the result for which plaintiffs contend here. Application of this rule would produce



exactly the opposite result from the one defendants contend for: under the arbitrary and capricious standard, a trustee's interpretation of the Plan's provisions stands unless it is unreasonable; as noted, under the plaintiffs' theory, the claimant's interpretation wins so long as it meets the same low standard.

We reject the plaintiffs' rule for reasons similar to the ones that led us to reject defendants': plaintiffs, like defendants, mischaracterize the incentives motivating the parties. For example, with respect to Count I, the trustee (Firestone) is clearly not disinterested in the amount of severance pay awarded; its impartiality therefore cannot be relied upon to produce a fair result. But whether the trustee can be a reliable decisionmaker is an entirely separate question from whether -- assuming an impartial adjudicator -- the plan document should be construed in favor of the employer or the employees.

The trust at issue here provides severance benefits, which are a form of wages. The benefits were offered as an inducement to the plaintiffs, to persuade them to work for Firestone. See *Kennet v. United Mineworkers*, 183 F. Supp. at 317. See also *Inland Steel Co. v. N.L.R.B.*, 170 F.2d 247, 253 (7th Cir. 1948), holding that "pension thus promised would appear to be as much a part of [the workman's] 'wages' as the money paid him at the time of the rendition of his services." In construing the agreement which embodies this aspect of the parties' bargain -- the Termination Pay Plan -- we therefore think it best to take as our starting point the principles governing construction of contracts between parties bargaining at arms' length. These principles counsel a construction of the trust document steering a middle course between the constructions of the document now offered by plaintiffs and defendants. In light of the

arms' length relationship between employer and employee, that seems most fitting here. Thus the industry practice with respect to severance pay plans would shed light on this plan's meaning, as would past practice under the plan itself. We apply and elaborate on this contract construction standard in the following discussion.

III. THE MERITS OF
COUNT I (TERMINATION PAY)

As part of its compensation package for salaried employees Firestone's Handbook for Salaried Employees stated:

> If your service is discontinued prior to the time you are eligible for pension benefits, you will be given termination pay if released because of a reduction in work force or if you become physically or mentally unable to perform your job.
>
> The amount of termination pay you will receive will depend on your period of credited company service.

App. 283. The parties agree that under ERISA this statement creates -- and constitutes -- a Termination Pay Plan, which is an unfunded "Welfare Plan" as ERISA defines that term. See 29 U.S.C. § 1002(1). Because the statement has that significance, Firestone concedes that its Termination Pay plan was subject to the reporting and disclosure obligations governing all Welfare Plans. See 29 U.S.C. § § 1021 - 1031. The parties also agree that Firestone did not comply with these obligations, though they disagree about the significance of that dereliction.

Plaintiffs requested termination pay pursuant to the Termination Pay plan, arguing that the sale of the Plastics Division constituted a "reduction in force" within the meaning of the plan. In its capacity as Plan



administrator Firestone denied this request. Firestone believed that the sale of the Plastics Division did not constitute a "reduction in force" within the meaning of that term as it is used in the Termination Pay plan. In support of their contention plaintiffs rely on a line of cases holding that severance pay is due whenever an employee ceases to work for the employer (without having been fired for cause), even if the employer has sold the operation in which the employee worked and the operation's new owner has offered to retain the employee in his job. One rationale behind these cases is that salary and benefits may well be lower under the new employer, and that severance pay is intended to compensate the employee for these losses -- not merely to compensate for losses incurred as a result of unemployment. See *Chapin v. Fairchild Camera & Instrument Corp.*, 31 Cal. App.3d 192, 107 Cal. Rptr. 111 (1st Dist. 1973); *Mace v. Conde Nast Publications, Inc.*, 155 Conn. 680, 237 A.2d 360, 363 (1967); *Dahl v. Brunswick Corp.*, 227 Md. 471, 356 A.2d 221 (1976); *Owens v. Press Publishing Co.*, 20 N.J. 537, 120 A.2d 442 (1956); *Adams v. Jersey Central Power & Light Co.*, 21 N.J. 8, 120 A.2d 737 (1956).

The district court granted summary judgment for defendants on this Count. It held that Firestone did not act arbitrarily or capriciously in construing the term "reduction in force" to exclude a sale in which the purchaser offers continued employment. Like the defendant, the district court adopted another line of cases allowing employers to refuse to provide severance pay when the employer sells the operation and the new owner offers all employees the opportunity to work for him. See, e.g., *Holland v. Burlington Industries*, 772 F.2d 1140 (4th Cir. 1985), affirmed mem., 106 S.Ct.

3267, cert. denied, 106 S.Ct. 3271 (1986)[12]; *Pabst Brewing Co. v. Anger*, 784 F.2d 338 (8th Cir. 1986) (per curiam); *Blakeman v. Mead Containers*, 779 F.2d 1146 (6th Cir. 1985). A number of cases reach this result in construing the very Termination Pay plan at issue here. See *Adcock v. Firestone Tire & Rubber Co.*, 616 F. Supp. 409 (M.D. Tenn. 1985), affirmed in relevant part, Nos. 85-6031 and 85-6067 (6th Cir. June 26, 1987); *Davidson v. Firestone Tire & Rubber Co.*, No. 84-1215 (W.D. Tenn. May 30, 1986); *Sisk v. Firestone Tire & Rubber Co.*, No. 83-CV-1448-DT (E.D. Mich. Sept. 19, 1986).

These cases rely on the arbitrary and capricious standard, so their holding is limited to the proposition that an employer does not act unreasonably if it denies severance pay when the former employees remain employed; such a holding does not necessarily mean that severance pay can be due only when employees are unemployed. The cases suggest, however, that severance pay is intended only to compensate employees for losses they incur because they have no job. See, e.g., *Holland*, 772 F.2d at 1149 ("Burlington presented evidence that the plan was primarily intended for employees who suffered a period of unemployment when they were involuntarily terminated from their jobs").

Because the district court applied the wrong scope of review, and because application of that (arbitrary and capricious) standard was outcome determinative, we must reverse the summary judgment on Count I and remand for further proceedings consistent with this opinion. We suggest several principles of contractual construction which we believe will be relevant in the proceedings to come. We begin with several rules of interpretation which aid courts in

12. See note 4 above.



identifying the intention of parties to a contract.

Some of the cases cited above suggest that there is a practice of paying severance pay whenever employees leave an employer, regardless of whether or not the employees are actually without a job for a time. At the same time, the defendants have cited cases showing that many employers do not pay severance pay unless the employees are in fact without a job. We have no way of telling which -- if either -- of these cases represents current practice. The district court should attempt to answer that question on remand. See Restatement (Second) of Contracts § 202(5) (instructing that "the manifestations of intention of the parties to a promise or agreement are interpreted as consistent . . . with any relevant . . . usage of trade").

Similarly, the defendants have argued that their own practice with respect to the Firestone Termination Pay plan is that benefits are paid only if employees are without any job when they cease work for Firestone. Plaintiffs have contested this version of Firestone's past practice. In determining the plan's meaning the district court should take account of such evidence of past practice under the plan. See Restatement (Second) of Contracts § 202(4).[13]

Additionally, plaintiffs have pointed to language in a Firestone memorandum which they claim supports their contention that a reduction in force includes any separation of an employee from Firestone regardless of whether or not the employee has another job. This evidence, if credited and if construed as plaintiffs

13. That section provides:

> Where an agreement involves repeated occasions for performance by either party with knowledge of the nature of the performance and opportunity for objection to it by the other, any course of performance accepted or acquiesced in without objection is given great weight in the interpretation of the agreement.

invite the court to construe it, would also support the result for which they contend. See Restatement § 202(5) ("[w]herever reasonable, manifestations of the parties to a promise or agreement are interpreted as consistent with each other").

The district court may also find that, under the common usage in the trade, or under Firestone's past practice, Termination Pay is awarded even if employees remain employed if their compensation drops substantially when the employees cease to work for the employer. Here the parties disagree about whether or not the plaintiffs' compensation after the sale of the Plastics Division is as great as it was before -- particularly with respect to benefits, such as the provision of Termination Pay. If the district court determines that the award of Termination Pay turns on the difference in the employees' compensation before and after the sale, it should ascertain the scope of any such difference in rate of pay.

It may be, however, that while these canons of construction prove helpful, they do not resolve the case by themselves. That is in part because this is a unilateral contract, and it may be that the parties here simply never agreed on what the term "reduction in force" would mean; if that is so then rules of interpretation designed to help courts identify that intention will not be helpful. The problem facing the district court on remand would then be akin to the difficulties a court faces when parties omit an essential term. The Restatement instructs that in that circumstance "a term which is reasonable in the circumstances is supplied by the court." Restatement (Second) of Contracts § 204. If the parties here did not agree on what would constitute a "reduction in force," so that the court cannot enforce their intention, then the court should adopt the most reasonable



understanding of the term.[14]

## IV. SCOPE OF REVIEW AND COUNTS III AND V

We must also discuss the issue of scope of review in connection with Counts III and V. In Count III plaintiffs have alleged that certain representations in the Employee Handbook about the Early Retirement Plan estop Firestone from denying plaintiffs Early Retirement benefits and awarding them "deferred vested benefits" instead. In Count V plaintiffs contend that the sale of the Plastics Division constituted an early termination of the Stock Ownership Plan as described in ERISA, 29 U.S.C. § 411 (d)(3), which in turn caused otherwise unvested rights in that plan to vest on the date of sale.

The district court held that defendants were not equitably estopped from denying plaintiffs Early Retirement benefits, and that there was no partial termination. But the arbitrary and capricious standard was not entirely absent from this part of the district court's opinion. The plaintiffs argued that the plan description led them to reasonably expect benefits, and that our holding in *Northeast Dep't ILGWU v. Teamsters Local 229 Welfare Fund*, 764 F.2d 147 (3d Cir. 1985) therefore compelled the award of those benefits. The district court held that

> plaintiffs' theory is inconsistent with the standard of review under which I must approach this case, i.e. the arbitrary and capricious standard. *Northeast Dept. ILGWU*, 764 F.2d at 163. Defendants' decision must be sustained unless

14. Even in this eventuality, however, the court will be helped in identifying the most reasonable term by the information discussed above relating to the parties' and the industry's past practice and to Firestone's other statements regarding the term's meaning.

> that decision was arbitrary and capricious. I cannot defer to plaintiffs' interpretation although it is one factor to be considered.

Slip op. at 26.

The arbitrary and capricious standard also appears in the parties' arguments under Count V, having to do with an asserted partial termination of the plan, and in the district court's decision on that count. Plaintiffs argued that defendants were obliged to address the question whether there had been a partial termination; the defendants' failure to address that question, the plaintiffs argued, made the denial of benefits arbitrary and capricious. The district court held that the defendant's action was not arbitrary and capricious, and therefore that it was permissible under ERISA.

Because of the nature of the challenges advanced in Counts III and V, we believe that the question of deference to the administrator's decision has no place in the court's discussion of the claims advanced in those parts of the complaint. The standard of conduct governing the fiduciary is that his conduct not be "arbitrary, capricious, or made in bad faith, not supported by substantial evidence, or *erroneous on a question of law.*" *Rehmar v. Smith*, 555 F.2d 1362, 1371 (9th Cir. 1977) (emphasis added). Whether or nor Firestone is equitably estopped from denying benefits is, for present purposes, a question of law. So is the question whether or not there was a partial termination.

Put another way, trustees only have discretion to decide those matters expressly delegated to them by the trust instrument. Comment *a* to Restatement of Trusts (Second) § 187 (emphasis added), which sets out the arbitrary and capricious standard, provides:



> The exercise of a power is discretionary except to the extent to which its exercise is required by the terms of the trust *or by the principles of law applicable to the duties of trustees.*

While the decision to grant or deny benefits may be committed to the trustee's discretion by a trust, the question whether there has been a partial termination, or whether or not the plan is equitably estopped from denying a claim, are never committed to the trustee at all. Those questions are governed by "the principles of law applicable to the duties of trustees." When posed to a court the court must answer them de novo. See *Rosen v. Hotel and Restaurant Employees*, 637 F.2d 592, 597 (3d Cir. 1981) (ignoring arbitrary and capricious scope of review and determining equitable estoppel claim on the merits, without any deference to plan administrator).

## V. THE MERITS OF COUNT III (EARLY RETIREMENT BENEFITS)

At issue in Count III is the distinction between Early Retirement and Deferred Vested benefits. Three kinds of benefits are relevant for purposes of this Count.

The Retirement Plan provided that employees could retire with regular Retirement benefits at age 65. However, employees could also retire before age 65 if they had ten years of service, or if they were at least 55 years old and had thirty years of service. The Early Retirement benefit they would then receive would be equal to the Regular Retirement benefit minus .4% for each month by which the employee's age was less than 62, and .2% for each month by which the employee's age was less than 50.

Finally, an employee who was eligible for neither

Regular or Early Retirement benefits could still receive deferred vested benefits, so long as he had ten years of service with Firestone. The deferred vested benefit was smaller than the Early Retirement benefit, and was equal to the actuarial equivalent of the amount the employee would have received had he taken regular retirement at his last rate of pay.[15]

Predicating their claim on the theory of equitable estoppel, the plaintiffs argue in Count III that they are entitled to Early Retirement benefits, which Firestone refused to award plaintiffs, instead of the deferred vested benefit, which plaintiffs actually received. Plaintiffs argue that the plan misled them into believing that they would received the Early Retirement benefit and that they are therefore entitled to receive it.

The district court correctly summarized the requisites of an equitable estoppel claim: there must be a material misrepresentation or omission, reasonable reliance thereon, and damage. See *Rosen*, 637 F.2d at 597; *Consolidated Express v. New York Shipping Ass'n*, 602 F.2d 494, 510 (3d Cir. 1979); see also Restatement (Second) of Contracts § 90 comment *a* ("Estoppel prevents a person from showing the truth contrary to a representation of fact made by him after another has relied on the representation"). We agree with the district court that there has been no misrepresentation here, because the plan summary was sufficiently clear about the distinction between the early retirement benefit and the deferred vested benefit.

15. The deferred vested benefit is paid over more years than the regular retirement benefit, because the employee begins receiving the former before he turns 65, when the latter begins. The actuarial equivalent of the regular pension benefit is an amount which reflects this fact, reducing the amount paid each month so that the present value of the total income stream is equal to the present value of the income stream produced by the regular pension benefit.



The employee handbook gives an example of how the early retirement benefit is computed, explaining that a 55 year old employee who elected to receive the early retirement benefit would receive 66.4% of the amount he would have received had he taken regular retirement.[16] The handbook gives no examples of how to compute a deferred vested benefit, nor does it define the term "actuarial equivalent."

Several named plaintiffs testified in deposition that they expected to receive Early Retirement benefits when Firestone sold the Plastics Division. (Although they did not identify by name the benefit to which they thought they were entitled, these employees testified that they expected to receive 66.4% of the amount they would have received had they taken regular retirement. The precision of the employees' recollection as to the fraction of their regular retirement benefits represented by the benefit they expected makes clear that they were thinking of the early retirement benefit.)

While the named plaintiffs' testimony would certainly justify a finding that the plaintiffs did not understand how their benefits program worked, however, this evidence does not identify any factual misrepresentation in the handbook. The handbook correctly sets out the eligibility requirements for both the deferred vested and early retirement benefits. Indeed, the plaintiffs point to no statement in the handbook which they claim is false. The only fault

16. This number was computed as follows:

The early retirement benefit is equal to the regular retirement benefit reduced by .4% for each month by which the employee's age is less than 62. A 55 year old employee is 84 months younger than 62, so his retirement benefit would be reduced as follows:

$$84 \times .4\% = 33.6\%$$

$$100\% - 33.6\% = 66.4\%.$$

plaintiffs can identify with the handbook is that while it gave examples of what the early retirement benefit would be for employees retiring at various ages, it gave no such examples for the deferred vested benefit. That is obviously not a misrepresentation, and it is not the omission of a fact: it is only the omission of what might have been a helpful explanation.

Finding no misrepresentation or omission, we need not investigate the merits of the other elements of an equitable estoppel claim.[17] The district court's grant of summary judgment for Firestone on Count III will be affirmed.

## IV. THE MERITS OF COUNT V (THE STOCK OWNERSHIP CLAIM)

In Count V plaintiffs contend that Firestone's sale of its Plastics Division constituted a partial termination of the Stock Ownership Plan within the meaning of ERISA, 26 U.S.C. § 411(d)(3).

The district court concluded that there was no partial termination because the Plastics Division's sale affected only a very small fraction of the total number of employees covered by the Stock Ownership Plan. In so holding the district court relied on a line of cases and I.R.S. Revenue Rulings which define a partial termination in terms of the percentage of employees in the plan who were affected by the corporation's transaction. See *Babb v. Olney Paint Co.*, 764 F.2d 240 (4th Cir. 1985); *Ehm v. Phillips Petroleum Co.*, 583 F. Supp. 1113 (D. Kan. 1984); *Wishner v. St. Luke's Hospital Center*, 550 F. Supp. 1016, 1019 (S.D.N.Y. 1982); Rev. Rul. 81-27, 1981-1 C.B. 228; Rev. Rul. 73-284, 1973-2 C.B. 139; Rev. Rul. 72-439, 1972-2 C.B. 223. Under each of these authorities, the facts of this case would not constitute a partial termination, because only 2.2% of the employees covered by the plan were terminated. See *Babb*, 764 F.2d at 243 (12.84% not enough to constitute partial termination); *Ehm*, 583 F. Supp. at 1116 (2.5% not sufficient); *Wishner*, 550 F. Supp. at 1019 (3.7% not sufficient).

17. Plaintiffs make some suggestion in their briefs that we should judge misrepresentations particularly strictly in the ERISA context because of the employer's statutory obligation to write the plan "in a manner calculated to be understood by the average plan participant." ERISA § 102, 29 U.S.C. § 1022. Plaintiffs do not articulate this argument clearly, however, and the plaintiffs apparently did not raise it before the district court. We accordingly do not address it.



Plaintiffs argue, however, that these cases are either inapposite or wrongly decided, and that the Revenue Rulings are not dispositive on the question whether a partial termination has occurred for ERISA purposes. Our decision in *United Steelworkers v. Harris & Sons Steel Co.*, 706 F.2d 1289 (3d Cir. 1983) supports the latter proposition, for we held there that facts constituting a partial termination for tax purposes will not necessarily constitute such a termination for ERISA purposes. We decided in *Harris* that Pension Benefit Guaranty Corporation insurance, which ERISA makes available only on partial termination, might in fact have been available to the plaintiff steelworkers even though the employer had not engaged in a tax code partial termination.

Plaintiffs argue further that whether a partial termination has occurred for present purposes should turn on the total number of employees affected, or the amount of money the employer saves by terminating the affected employees. In support of this proposition they cite *Weil v. Terson Co. Retirement Plan*, 750 F.2d 10 (2d Cir. 1984), in which the Second Circuit held that a partial termination for ERISA purposes should be identified on the basis of "the number of employee

terminations made in connection with" the transaction said to constitute the partial termination. Id. at 12.

We reject the plaintiffs' contention, and disagree with the approach taken by the Second Circuit in *Weil*. Section 411(d)(3) provides in pertinent part that

> a trust shall not constitute a qualified trust under section 401(a) unless the plan of which such trust is a part provides that--
>
> > (A) upon its termination or partial termination . . .
>
> the rights of all affected employees to benefits accrued to the date of such termination, partial termination, or discontinuance, to the extent funded as of such date, or the amounts credited to the employees' accounts, are nonforfeitable.

This provision is intended to prevent employers from maintaining pension plans for the purpose of deferring income, and thereby reducing their taxes, rather than for the purpose of providing retirement benefits for employees. The penalty for violation of this section -- i.e. for maintenance of a plan that does not provide for full vesting on partial termination -- is loss of § 401 qualification -- a very severe penalty. As a result of this provision, all qualifying pension plans contain the assurances required by this section. Plaintiffs can then sue on the basis of the plan language, as they have done here.

We believe that the structure of the statute suggests that a partial termination should be found under § 411(d)(3) only if so many people have been terminated that the plan appears to have been created as a mechanism for deferring the recognition of income, and thereby reducing taxes, rather than as a mechanism for the provision of retirement benefits to



employees. That formulation suggests that the district court was correct in focusing on the percentage of employees in the plan who were affected by the transaction said to constitute a partial termination. Because that fraction was so low in this case -- approximately 2% -- the district court was also correct in holding that the sale of the Plastics Division did not constitute a partial termination.

We note that the plaintiffs' argument is essentially driven by the theory that the partial termination provision was designed to protect employees from dismissals motivated by an employer's desire to avoid paying pension benefits. That desire was indeed a very important goal of ERISA. But Congress pursued that goal in other sections of ERISA, by providing detailed mandatory vesting schedules, and such requirements are a much more precise way of solving the problem of strategically motivated dismissal. Attributing this goal to the partial termination provisions as well makes the partial termination provision seem both superfluous and clumsy. This consideration also supports the result we reach.

We note, however, that it is not easy to divine the purpose of § 411(d)(3). Without a clear sense of the provision's purpose it is difficult to decide what should and should not constitute a partial termination. Clarification from Congress or the Internal Revenue Service as to the purpose of this provision would make it substantially easier to enforce.

## VI. THE MERITS OF COUNT VII (REQUEST FOR INFORMATION)

In the last Count before us on appeal three of the named plaintiffs sue individually, alleging that the plan administrator failed to respond properly to their requests for information made pursuant to § 502(c) of ERISA, 29 U.S.C. § 1132(c). That section provides:

> Any administrator who fails or refuses to comply with a request for any information which such administrator is required by this subchapter to furnish to a participant or beneficiary . . . may in the court's discretion be personally liable to such participant or beneficiary in the amount of up to $100 a day from the date of such failure or refusal.

The district court held that these plaintiffs were not entitled to relief under this provision because they had made their requests for information after they ceased to be Firestone employees. The district court held that, because they were no longer Firestone employees and because -- as it had concluded earlier in the same opinion -- they were not entitled to any benefits from any of the plans, the named plaintiffs were not "participants or beneficiaries" of the plans.

ERISA defines the term "participants" to mean

> any employee or former employee of an employer, or any member or former member of an employee organization, who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer or members of such organization, or whose beneficiaries may be eligible to receive any such benefit.

29 U.S.C. § 1002(7). The statute defines a "beneficiary" as "a person designated by a participant, or by the terms of an employee benefit plan, who is or may become entitled to a benefit thereunder." Id. § 1002(8).

A line of cases in the Fifth and Ninth circuits takes the same approach as the district court here. See *Nugent v. Jesuit High School*, 625 F.2d 1285 (5th Cir. 1980); *Weiss v. Sheet Metal Workers Local No. 544 Pension Trust*, 719 F.2d 302 (9th Cir. 1983); *Freeman*



*v. Jacques Orthopedic & Joint Implant Surgery Medical Group*, 721 F.2d 654 (9th Cir. 1983). These cases hold that one is a participant or beneficiary only if he is now receiving benefits from the plan or reasonably expects to receive them in the future because benefits which are now unvested can reasonably be expected to vest later.

The wording of § 502(c) is identical in this respect to the language in § 502(a), conferring standing to bring an ERISA claim. Section 502(a)(1) provides that a civil action may be brought, inter alia, "by a participant or beneficiary." 29 U.S.C. § 1132(a)(1). Applying the logic of the above opinions to the standing provision leads to the conclusion that one has no standing to bring an ERISA claim -- i.e. no standing to claim that he is entitled to benefits -- unless he is entitled to benefits.[18]

We reject that conclusion as well as the reasoning which leads to it. We do not think that a person lacks standing to claim an entitlement to benefits just because it turns out that he is in fact not entitled to those benefits. When a court holds that a claimant is not entitled to benefits, the claimant loses on the merits and judgment is entered against him. As a practical matter, therefore, courts normally read § 502(a) as if it read: "a civil action may be brought by *someone who claims to be* a participant or beneficiary."[19]

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18. The Fourth Circuit, it should be noted, has expressly rejected this, holding that one may have standing to sue under § 502 even if he is not entitled to benefits. *Salomon v. Transamerica Occidental Life Ins. Co.*, 801 F.2d 659 (4th Cir. 1986).

19. We have the same common sense understanding of provisions conferring standing and subject matter jurisdiction under other statutes. Section 4 of the Clayton Act, for example,

We think that the same reading should be accorded § 502(c). A provision such as that one, entitling people to information on the extent of their benefits, would most sensibly extend both to people who are in fact entitled to a benefit under the plan and to those who claim to be but in fact are not. People who worked for a company for a time, and who are not certain whether or not they are entitled to benefits would obviously need the information § 502(c) discusses in order to know whether to press their claim.

Moreover, defendants' understanding would often allow the entitlement to information to turn on the plan administrator's belief as to the merits of the claimant's request for benefits. Yet simply because the plan administrator believes the claimant is not entitled to benefits does not mean that he is in fact not so entitled. The plan administrator might be wrong -- as he may have been with respect to the Termination Pay plan at issue in Count I of this complaint. Even the cases we reject would permit the employee to recover damages under § 502(c) if the claimant sues and it turns out that he was entitled to benefits. But if the employee is left uninformed his rights may remain unvindicated even if the administrator is wrong,

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confers jurisdiction on the federal district courts "to prevent and restrain violations of sections 1 to 7 of" title 15. We understand this provision to confer jurisdiction on the federal courts to hear *claims* that a violation has occurred (or will occur). If at the end of trial the court finds that there was no violation, so that the defendant wins, the victory is on the merits. We do not hold that, because there was no violation of the relevant antitrust provision, the court lacked subject matter jurisdiction.

We note that the Supreme Court rejected a similarly erroneous rule in *Bell v. Hood*, 327 U.S. 678, 682 (1946), where the Court explained that a lack of standing should not be confused with a lack of subject matter jurisdiction.



because the administrator's failure to provide information to the employee may prevent the employee from suing.

Finally, however, -- and this is the most compelling reason for our holding -- ERISA's legislative history makes clear that Congress intended the information-producing provisions to enable claimants to make their own decisions on how best to enforce their rights. See S. Rep. 93-127, 93d Cong. 1st Sess. at 27 (ERISA's reporting and disclosure requirements imposed so "that individual participants and beneficiaries will be armed with enough information to enforce their own rights"). That function can be performed only if all people with potential rights can obtain information.

Having said that, we concede that it is expensive and inefficient to provide people with information about benefits -- and permitting them to obtain damages if information is withheld -- if they are clearly not entitled to the benefits about which they are informed. But while this is indeed a problem, we do not believe it insuperable.

Section 502(c) grants significant discretion to the district court to decide whether to award damages under that provision. We think that that discretion can be used, for example by granting summary judgment in appropriate cases, to prevent strategic behavior by plaintiffs seeking to take unfair advantage of § 502(c)'s damage provisions when they are not entitled to any ERISA benefits. For example, if the employee's claim for benefits is not colorable, and if the employer displayed no bad faith in responding to the claim -- taking somewhat too long to respond to it, for instance, but not ignoring it entirely -- then the district court would be well within its discretion in setting damages at $0.

*CONCLUSION*

For the foregoing reasons, we will affirm the summary judgment on Counts III and V. However, we will reverse the summary judgment on Counts I and VII, and remand those aspects of the case to the district court for further proceedings consistent with this opinion.

A True Copy:

Teste:

*Clerk of the United States Court of Appeals for the Third Circuit*

(A.O. U.S. Courts. G.M.C. Printing. Phila., Pa. 215-568-4264)



IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

| | | |
|---|---|---|
| RICHARD BRUCH, *et al.* | : | CIVIL ACTION |
| v. | : | NO. 82-3286 |
| FIRESTONE TIRE & RUBBER | : | |
| COMPANY, *et al.* | : | |

**MEMORANDUM AND ORDER**

HUYETT, J. June 9, 1986

This ERISA class action arises out of the November 30, 1980 sale by Firestone Tire & Rubber Company ("Firestone") of five of its plants which, together, constituted its Plastics Division. All five plants were sold as ongoing operations to Occidental Petroleum, the Hooker Chemical Division. Of the seven original counts in the second amended complaint, five remain in this action. All five counts are the subject of the cross-motions for summary judgment which are presently pending before me. Before delving into a detailed analysis of the issues raised by each of plaintiffs' claims, I will outline briefly the facts underlying this action, the claims plaintiffs have raised, the procedural posture of the action, and the standard by which plaintiffs' claims must be evaluated.

The five plants which comprised Firestone's Plastics Divisions were located in Pottstown, Pennsylvania; West Caldwell, New Jersey; Perryville, Maryland; Salisbury, Maryland; and Baton Rouge, Louisiana and employed approximately 500 salaried employees. The six named plaintiffs are former, salaried, non-union employees who worked at the Pottstown, Pennsylvania plant. They represent four classes of salaried, non-union individuals who were employed in Firestone's Plastics Division on the date of the sale. Following the sale, plaintiffs and most of the other employees continued, without interruption, to perform their same jobs at the same rates of pay as employees of the new owner, Occidental.

Of the five remaining claims, four are being maintained on behalf of classes; one claim is being asserted by individual named plaintiffs. In count one, plaintiffs, representing a class

of all salaried employees employed in the five plants on November 30, 1980 except those employees who retired at the time of the sale or who have been paid termination pay with regard to their employment with Firestone's Plastics Division, claim that they are entitled to termination pay on the grounds that they were terminated by Firestone at the time of the sale; the sale, plaintiffs allege, constituted a reduction in force under Firestone's termination pay policies thereby entitling them to the termination pay.

Count three states a claim for redress for the difference under Firestone's Retirement Plan for Salaried Employees ("Retirement Plan") between an early retirement benefit and a deferred vested retirement benefit. Plaintiffs bring this claim on behalf of a class of all salaried, non-union employees at the five plants who did not qualify, before the date of the sale, for normal or early retirement under the Firestone Retirement Plan. In count five, plaintiffs, on behalf of a class of all salaried, non-union employees at the five plants who had non-vested accrued benefits credited to their accounts under Firestone's Stock Purchase and Savings Plan ("Stock Plan"), seek the vesting of their unvested interests in Firestone's contributions to the Stock Plan.

In count six, plaintiffs represent a class of all salaried, non-union employees who were employed in the five plants on the date of the sale who had vacation time accrued on November 30, 1980 but had not yet taken it. Plaintiffs claim that they are entitled to the vesting of credit for purposes of the Retirement and Stock Plans for the accrued vacation time which was unused at the time of the sale. Finally, in count seven, several individual plaintiffs state a claim for breach of ERISA's reporting and disclosure requirements.

The Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001 *et seq.*, is a comprehensive statute designed to protect employees enrolled in pension and welfare benefit plans. ERISA provides a private right of action to any participant or beneficiary to enforce his or her rights under either a pension or a welfare benefit plan. 29 U.S.C. § 1132(a)(3)(B)(ii). Although pension and welfare benefit plans serve differ-



ent purposes, ERISA subjects them to common reporting and disclosure requirements, 29 U.S.C. §§ 1021-31, and standards of fiduciary conduct, 29 U.S.C. §§ 1101-14. Welfare benefit plans, however, are not subject to ERISA's vesting provisions or minimum substantive provisions. Termination pay plans are now generally classified as "employee welfare benefit plans" within the meaning of 29 U.S.C. § 1002(1) and are, therefore, governed by ERISA.

Summary judgment may be granted only when it has been established that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c); *Small v. Seldows*, 617 F.2d 992 (3d Cir. 1980). The court does not decide issues of fact, but merely determines if there is an issue of fact to be tried. *Ettinger v. Johnson*, 556 F.2d 692 (3d Cir. 1977). The facts must be viewed in the light most favorable to the non-moving party, and any reasonable doubt as to the existence of a genuine issue of fact is to be resolved against the moving party. *Continental Ins. Co. v. Bodie,* 682 F.2d 436 (3d Cir. 1982).

Firestone was the administrator of the three plans involved in the claims raised by plaintiffs, and as such, is a fiduciary under ERISA. In reviewing a decision by the administrator of a pension or welfare benefit plan, I am limited to determining whether the administrator's actions were arbitrary and capricious. Unless the decision was arbitrary and capricious, the administrator satisfied its fiduciary obligations under 29 U.S.C. § 1104.[1] *See Northeast Dep't. ILGWU Health*

1. Plaintiffs suggest that courts have developed a three-pronged test when applying the "arbitrary and capricious" standard, the three elements of which are: whether the decision of the trustees is supported by substantial evidence, whether the trustees have made an erroneous decision on a question of law, or whether the trustees have acted in bad faith. In this circuit, the courts have not articulated such a test; rather they have simply focused on whether the decision was arbitrary and capricious without further defining that standard. The three elements to the test plaintiffs propose are certainly factors to be considered but they alone are not determinative of whether defendants have breached their fiduciary duty.

*and Welfare Fund v. Teamsters Local No. 229 Welfare Fund*, 764 F.2d 147, 163 (3d Cir. 1985); *Wolf v. National Shopman Pension Fund*, 728 F.2d 182, 187 (3d Cir. 1984).

*Count One—Termination Pay*

In count one, plaintiffs seek the recovery of severance or termination pay benefits to which they claim they were entitled upon the sale of the Plastics Division. Upon divestiture of the five plants, Firestone refused to pay severance benefits, asserting that no event had occurred which gave rise to a right to such benefits.

At the time of the sale, Firestone maintained a non-funded, non-contributory severance pay benefit plan for its employees. The terms of the plan were set forth in two personnel documents. First, the Salaried Employees Handbook, which was in effect in 1980 and which was given to each employee, provided in pertinent part:

> If your service is discontinued prior to the time you are eligible for pension benefits, you will be given termination pay if released because of a reduction in work force or if you become physically or mentally unable to perform your job.
>
> The amount of termination pay you will receive will depend on your period of credited company service.

Plaintiffs contend that the sale constituted a reduction in force. The Handbook, however, does not provide any definition of "reduction in force."

Firestone's termination pay policies were set forth in greater detail in the Manual which was a confidential company document not generally circulated to employees, but which was, according to defendants, available for an employee to review upon request. A reduction in force (RIF) is defined generally in the Manual as "termination by the Company, without prejudice to the employee." Section 1.5.4. Section 2.11.3 further states:

> Despite the objectives of Firestone to provide stable employment, continued earnings and benefit coverages to



> its employees, there may be economic conditions that develop which make it necessary for the Company to temporarily or permanently terminate the employment of some of its work force.
>
> In the event such release must be made, the following reduction in force policies have been established with the goal of minimizing the economic and mental stress of terminated employees during the period of time between release from Firestone and securing other employment . . .

Plaintiffs contend that defendants may not properly rely on the provisions of the Manual because the language in section 2.11.3 which defendants cite in their motion for summary judgment was added to the Manual only one month before the November 30, 1980 sale. Plaintiffs also argue that this Manual was not made available to the employees. I note that plaintiffs, in their second amended complaint, specifically relied on provisions in the Manual to support their claim for termination benefits; it would be rather anomalous to permit plaintiffs to rely on a document while prohibiting defendants from using it to support their defense. Nevertheless, at oral argument, defense counsel stated that defendants did not consider reliance on the Manual essential to their position. Because I find sufficient grounds for rejecting plaintiffs' termination pay claim without reference to the Manual, I need not decide whether reliance on the Manual is appropriate.

There is no dispute that Firestone's termination pay plan was an "employee welfare benefit plan" and as such is subject to the fiduciary and reporting and disclosure requirements of ERISA. *See* 29 C.F.R. § 2510.3-1(3). Employee welfare benefit plans, however, are not subject to the vesting and minimum substantive content provisions of ERISA. The issue that arises, therefore, is whether, in the absence of a statutory guarantee or right in an employer's termination pay plan, an employer, who has offered such a plan, may later terminate the plan without incurring liability for the previously prom-

ised benefits. Plaintiffs contend that the employer may not; employees acquire a contractual interest in welfare benefit plans enforceable under federal common law.

The court in *Adcock v. The Firestone Tire & Rubber Co.*, 616 F. Supp. 409, 414-419 (1985), facing precisely the same claim raised by plaintiffs here, held that the plaintiffs, salaried non-union employees, possessed a contractual right to benefits under the Firestone severance pay plan, a deferred and contingent right.[2] "The plan is subject to the procedural protections contained in ERISA, that is, reporting and disclosure requirements and fiduciary standards, but with substantive rights governed by common law contract principles." *Adcock* at 419.

I reach the same conclusion in this action. ERISA is silent as to the rights an employee has in welfare benefit plans; therefore, it is necessary to look to another source to determine what rights, if any, an employee has in welfare benefits. The source is federal common law: "Congress intended that a body of Federal substantive law ... be devel-

2. In *Adcock v. Firestone*, 616 F. Supp. 409 (1985), Judge Wiseman relied heavily on the district court's decision in *Hansen v. White Farm Equipment Corp.*, 42 B.R. 1005, 5 EBC 2130 (N.D. Ohio 1984), in which the court held that under contract principles, welfare benefit plans "vest upon retirement" and cannot be terminated even in the face of plan language which unequivocally authorizes such action. Defendants submitted for my conside. ıtion a copy of the Sixth Circuit's slip opinion in *Hansen* in which the court reversed the district court's holding. *See Hansen v. White Motor Corp.*, 788 F.2d 1186 (6th Cir. 1986). Defendants argue that the Sixth Circuit, in *Hansen*, rejected a federal common law, contractual analysis. However, in *Hansen*, the Sixth Circuit merely held that contract principles do not result in the absolute vesting of employee welfare benefits and no federal policy mandates a federal common law rule limiting the right of an employer to exercise after retirement a reserved right of termination of employee welfare benefits. The *Hansen* court accepted the notion that an employee may have a contractual right in his or her welfare benefits; the court rejected the concept that federal common law should define the substantive content of the contract. "It is the district court's further conclusion that a federal rule of decision should be created barring termination of welfare benefit plans, regardless of any clear, express contractual provision, which gives us pause." *Hansen*, slip op. [sic] at 1192.



oped by the court to deal with issues involving rights and obligations under private welfare and pension plans." 120 Cong. Rec. 29942 (1974) (remarks of Senator Javits). As the court in *Adcock* emphasized, the employer-employee relationship is contractual. Benefits are part of the package for which an employee exchanges his labor. The issue here is whether the termination pay benefits are contractual rights.

To create a binding contract, there must be an offer and an acceptance of the offer; both acts must be supported by sufficient consideration. As in *Adcock*, in this case, the employee's Handbook states that:

> If your service is discontinued prior to the time you are eligible for pension benefits, you will be given termination pay if released because of a reduction in work force or if you become physically or mentally unable to perform your job.

This provision constitutes an offer by Firestone to pay termination benefits in the event of a reduction in work force or a mental or physical disability by the employee. Plaintiffs accepted this offer by performing their jobs, at all times subject to the terms of the Handbook. Plaintiffs, therefore, acquired a contractual interest in the termination benefits which interest is subject to the procedural protections of ERISA. However, where the terms of the policy are susceptible to more than one reasonable interpretation, ERISA mandates that the court not substitute its judgment for that of the administrator.[3] Therefore, Firestone's interpretation of plaintiffs' rights will prevail unless it is arbitrary and capricious.

Relying on the court's analysis in *Blau v. Del Monte Corporation*, 748 F.2d 1348 (9th Cir. 1985), plaintiffs argue that they are entitled to termination pay because defendants' administration of the plan was so flawed by ERISA violations

3. Plaintiffs argue that where there is an ambiguity in the plan, the contractual ambiguity must be resolved against the author of the contract. This standard conflicts directly with the deference due the administrator and the arbitrary and capricious test of ERISA and is, therefore, pre-empted by ERISA.

that it was per se arbitrary and capricious to deny termination pay. In *Blau,* the court held that where defendant's administration of the plan was characterized by many ERISA violations, the lower court could not determine as a matter of law that the denial of severance pay was not arbitrary and capricious. The court found that Del Monte had not only made no attempt to comply with any of the duties imposed on a plan administrator by ERISA but also actually concealed the severance allowance policy. Moreover, in *Blau,* the termination pay plan provided that termination pay would be granted upon job elimination whenever "alternative employment opportunities are unavailable within the corporation." Del Monte nevertheless failed to apply this standard.

Although Firestone could have taken additional steps to advise plaintiffs of its policies, there is no evidence that it actively concealed its policies in the manner Del Monte had. The Handbook was available to all salaried employees, and it clearly stated that termination pay was available only in the event of a reduction in force or physical or mental disability. Moreover, prior to the sale, Firestone employees who inquired as to termination pay were told that termination pay would not be awarded at the time of the sale; management also apparently made several statements to this effect at the public meetings held for employees prior to the sale.

As the court in *Adcock* noted, *Blau* establishes a very high threshold for determining arbitrary and capricious conduct vis-a-vis noncompliance with ERISA's procedural requirements. Even if I accept all of plaintiffs' allegations as true, I do not believe that Firestone's conduct rises to the level of culpability necessary to cross the threshold set in *Blau.*

Defendant Firestone contends that under its termination pay policy, it had no obligation to pay termination pay benefits upon the sale of an ongoing operation when its former employees were immediately employed by the successor corporation without any significant loss in earnings or benefits. After a careful review of the facts of this case, existing case law, and Firestone's own past practices, I conclude that Firestone's decision to deny plaintiffs termination pay benefits was not



arbitrary and capricious and therefore not a breach of its fiduciary obligations under ERISA.

Plaintiffs' claim for termination pay is based on the theory that a reduction in force occurred when Firestone sold the five plants. No precise definition of reduction in force has been developed; therefore, the issue is whether Firestone's decision that the sale of the five plants did not constitute a reduction in force was arbitrary and capricious. In reviewing this situation, I must give deference to Firestone's decision. However, because Firestone avoided the outlay of a substantial amount of money by denying the plaintiffs termination pay, the deference I owe to that decision is reduced, and I may scrutinize the decision more closely. Nevertheless, I conclude that the decision to deny termination pay benefits was not arbitrary and capricious.

As noted, the Handbook merely states that termination pay will be available in the event of a reduction in force. The Manual defines a "reduction in force" broadly as "termination by the company, without prejudice to the employee." From this language, plaintiffs argue that they were entitled to receive termination benefits unless they left the employ of Firestone as a result of their own misconduct. I do not believe that this conclusion results from the limited language included in the Handbook or the Manual.

Although these two documents provide little guidance in defining the term "reduction in force," it is noteworthy that nothing in these documents suggests that a reduction in force would occur at the time of the sale of an operation as an ongoing business. General common usage of severance pay comports with the conclusion that termination pay would not be paid to employees who remain in the same job and continue to draw the same wage after the sale of a plant as an ongoing business. These employees suffered none of the hardships normally associated with a termination or reduction in force; they had no period of unemployment without income. Plaintiffs were immediately rehired by Occidential without missing a day of work.

The case law supports Firestone's interpretation of the

Termination Pay Plan. Holding that the administrators of the Plan acted in a rational and reasonable manner and in good faith in denying the plaintiffs termination pay upon the sale of a division as a going business, the court in *Sly v. P.R. Mallory & Co., Inc.*, 712 F.2d 1209, 1211 (7th Cir. 1983), affirmed the lower court's conclusion that "severance pay is generally intended to tide an employee over while seeking a new job and should be considered an unemployment benefit." Similarly, the court in *Jung v. FMC*, 755 F.2d 708 (9th Cir. 1985), distinguishing its earlier decision in *Blau v. Del Monte Corp.*, 748 F.2d 1348 (9th Cir. 1984), held that FMC's interpretation of the plan as not providing for severance benefits upon divestiture and transfer of employment was not arbitrary and capricious. The court also noted that to allow plaintiffs to recover severance pay would, in effect, allow a windfall to them when they retained their positions with the new owner.

Addressing Firestone's termination policy, Judge Wiseman in *Adcock v. The Firestone Tire & Rubber Co.*, 616 F. Supp. 409 (M.D. Tenn. 1985), held that "continued employment with a successor corporation following the transfer of ownership, although characterized by a termination of employment with the predecessor corporation, does not constitute an involuntary reduction in work force by the predecessor corporation thereby entitling the employee to severance pay benefits." Recently, Judge Todd reached the same conclusion in *Davidson v. Firestone Tire & Rubber Co.*, No. 84-1215, slip op. (W.D. Tenn. April 21, 1986) [Available on WESTLAW, DCTU database].

> Just as an employee who is rehired no longer has a need for termination pay, an employee who never leaves his job when a Firestone division is sold as a going concern has no reasonable expectation of receiving termination payments. Put simply, the termination pay program was intended to help those employees defendant Firestone believed needed the help, and not to give windfalls to former employees who did not need the help.

*Davidson*, slip op. at 6.



Firestone's past practices have been consistent with the position it adopted in this case. Before the sale of the Plastics Division, Firestone sold plans [sic] as ongoing businesses on at least three occasions. In 1984, Firestone sold two adhesive plants, one in Detroit, Michigan and one in Trenton, New Jersey. The purchaser of the plant, in each case, agreed to hire the existing employees, and on that basis, Firestone decided not to award termination pay. Similarly, in March 1975, Firestone sold its World Bestos plant in New Castle, Indiana. Again the purchaser agreed to hire all employees, and the employees were not paid termination pay by Firestone.

Employees who were terminated at the time of the closure of the Pottstown, Pennsylvania tire plant received termination pay, but as defendants note, these employees lost their jobs. There was no new owner to take over the plant; it ceased to operate. Therefore, plaintiffs' reliance on this episode is misplaced. Plaintiffs also rely on the fact that Firestone made payments to former employees who had worked at the Newport, Tennessee industrial products facility before Firestone sold it as a going concern. The new owner of the Newport, Tennessee plant offered benefits which were substantially less than Firestone's benefits; for example, the successor company had no pension plan at all and provided a much lower level of health insurance and other benefits. Although Firestone concluded that these employees were not entitled to termination pay, to provide partial relief from this special hardship, Firestone adopted a one-time policy applicable to the Newport plant and granted the employees a Service Recognition Award. Robinson Affidavit at ¶ 12.

As the court in *Davidson* concluded, the fact that Firestone made payments to the Newport employees does not support the argument that the refusal to pay termination benefits to plaintiffs was arbitrary and capricious. Firestone made the payments to its former Newport employees to compensate them for the significant reduction in benefits. Therefore, these employees did not receive a windfall. Although there are some differences in the benefits packages offered by Occidental and Firestone, counsel for plaintiffs was unable to

elaborate on these differences at oral argument; the differences which have been identified do not strike me as significant and certainly not as great as the differences which warranted the payment of the Service Recognition Award to the Newport employees.

For all these reasons, I conclude that Firestone's decision not to pay plaintiffs and the employees they represent termination pay was not arbitrary and capricious, and defendants are entitled to summary judgment on this count.

*Count three—Retirement Benefits*

Count three states a claim for redress for the difference under Firestone's Retirement Plan for Salaried Employees between an early retirement benefit and a deferred vested retirement benefit. Under the Retirement Plan, employees who had ten years of service and had reached age 55 or had thirty years of service, qualified for early retirement; the early retirement benefit consisted of the annual retirement income reduced by .4% for each month by which the employee's retirement age was less than age 62 and .2% for each month the retirement age was less than age 50. The early retirement benefit was not a vested benefit. Defendants, therefore, concluded that any employees who had not qualified for this benefit by the time of the sale lost their right to it and could receive only a deferred vested retirement benefit.

A deferred vested retirement benefit entitles an employee, who is terminated before he or she is eligible for the early retirement benefit but who has ten or more years of credited service, to receive a pension before age 65 in an amount which will be actuarially equivalent to the amount that would otherwise have been payable at the normal retirement age 65. In other words, the deferred benefit is reduced from the amount available at age 65 at an actuarial rate. The early retirement is, therefore, more favorable for employees.

Plaintiffs claim that they are entitled to an early retirement benefit rather than a deferred vested retirement benefit, and as a result of the sale of the Plastics Division by Firestone, the early retirement benefits to which they were entitled under the Retirement Plan were improperly reduced. Plaintiffs now agree that they did not qualify for the early retirement benefits under the terms of Firestone's Retirement Plan, but they contend that they should receive the early retirement benefit because (1) the summary plan description of the relevant Retirement Plan provisions was misleading and incomprehensible to the average plan participant, in violation of section 101(a) of ERISA, 29 U.S.C. § 1021(a), which sets forth disclosure requirements and Firestone is therefore "equitably estopped" from reducing plaintiffs' retirement benefits, and (2) plaintiffs are entitled to the early retirement benefits because they "reasonably anticipated" receiving the greater benefit and are therefore entitled to it.



The early retirement plan is set forth in detail in the May 1, 1979 Summary Plan Description.[4] Numerical examples are

4. Page 7 of the May 1, 1979 Summary Plan Description states the early retirement benefit in detail as follows:

How much do you get at early retirement?

> You may retire from the Company before your normal retirement date if you are at least age 55 and have ten or more years' service, or if you have 30 or more years' service regardless of your age.

If you are age 62 or over

> Your early retirement benefit will be calculated under the Basic Benefit Formula and the Final Average Earnings Formula—the same manner as the age 65 normal retirement benefit—based on your service and earnings to early retirement. You will receive 100% of the greater of the two amounts. There is no reduction for the commencement of this retirement benefit between age 62 and age 65.

If you are under 62

> Your benefit amount is calculated in the same manner as described above then multiplied by a percentage from this table:

| If your pension begins at: | This is your percentage: |
|---|---|
| Age 62 | 100.0% |
| Age 61 | 95.2 |
| Age 60 | 90.4 |
| Age 59 | 85.6 |
| Age 58 | 80.8 |
| Age 57 | 76.0 |
| Age 56 | 71.2 |
| Age 55 | 66.4 |

provided which illustrate how the benefit is reduced if the retiring employee is under 62. For instance, if the employee is 55 at the time he or she retires, the employee will receive 66.4% of his or her normal retirement pension.

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For ages less than 55, the table is appropriately extended.

(EXAMPLE: Age 60, monthly retirement benefit before reduction is $548. $548 × 90.4% = $495.39)

The reduction for the commencement of this retirement benefit before age 62 is 4/10 of 1% for each month (4.8% for each year) your age at retirement is under 62. The percentage of reduction for ages under 55 continues at 4/10 of 1% to age 50. Then the percentage becomes 2/10 of 1% for each month (2.4% for each year) your age at retirement is under age 50. The reduction takes into account the longer period of time over which you would be receiving benefits.

Page 11 of the May 1, 1979 Summary Plan Description deals with the deferred vested benefit and states as follows:

How much do you get if you should leave before retirement?

Your Retirement Plan can provide benefits if your service with the Company terminates before you are eligible for retirement.

If you have 10 or more years of credited service upon your termination:

You may receive a deferred vested pension calculated in the same manner as the normal retirement benefit based on your service and earnings to the date of your termination of employment. Your deferred vested pension will become payable when you reach your normal retirement age 65, or in a reduced amount before age 65.

You may request a refund of your contributions made before July 1, 1977 with interest at your termination of employment or at any time prior to payment of your deferred vested pension. However, if you do request a refund of your contributions, you will forfeit that portion of your retirement benefits attributable to your contributions with interest. The reduced benefit will not be less than that which would have accrued had you made no contributions.

You may elect that your deferred vested pension begin prior to your age 65—on the first day of any month which is after you attain age 55. However, the amount payable monthly will be reduced and will be actuarially equivalent to the amount that would otherwise have been payable at your normal retirement age 65.

If you have less than 10 years of service upon your termination: you will receive a lump sum equal to your total contributions with interest.



On page 11 of the May 1, 1979 Summary Plan Description, there is a section captioned: "How much do you get if you should leave before retirement?" In setting forth the conditions under which an employee may receive a retirement pension if he or she leaves Firestone before becoming eligible, the Summary provides that an employee who has ten years credit upon leaving will, at the age of 55, be able to start receiving a pension. If the employee elects to start receiving the deferred vested pension before turning 65, the Summary provides that "the amount payable monthly will be reduced and will be actuarially equivalent to the amount that would otherwise have been payable at your normal retirement age 65." May 1, 1979 Summary Plan Description p. 11.

Pursuant to section 102(a) of ERISA, a summary plan description must be "written in a manner calculated to be understood by the average plan participant," i.e. written in layman's language, and it must be "sufficiently accurate and comprehensive to reasonably apprise such participants and beneficiaries of their rights and obligations under the plan." 29 U.S.C. § 1022 (a)(1). Plaintiffs contend that the May 1, 1979 Summary Plan Description which outlines the two retirement benefits failed to meet these ERISA standards.

At oral argument, plaintiffs' counsel suggested that the alleged defects in the May 1, 1979 Summary Plan Description could have been remedied by the addition of a single sentence to the effect that actuarial reduction is different from the reduction for the early retirement benefit. Plaintiffs attempt to illustrate the misleading effect of the Summary Plan Description by including excerpts from the depositions of the class representative to the effect that they had thought that they would be entitled to the greater retirement benefit at 66.4% rather than the deferred vested retirement benefit at 40.7%. Plaintiffs also contend that the Summary should have provided examples or hypothetical questions and answers to explain the nature of or the amount of the reduction applicable to a deferred vested pension. Failure to include an explanatory sentence or otherwise to make clear the difference between the early retirement benefit and the deferred vested

retirement benefit, plaintiffs contend, resulted in a misrepresentation and a violation of the disclosure requirements of ERISA and estops defendants from denying plaintiffs and the employees they represent the early retirement benefits.

In order to invoke the doctrine of equitable estoppel, plaintiffs must establish three elements: a misrepresentation or omission of a material fact by one party, reasonable reliance on that misrepresentation by the other party, and detriment to the other party. *Community Health Services v. Califano*, 698 F.2d 615, 620 (3d Cir. 1983), *rev'd on other grounds*, 467 U.S. 51, 104 S. Ct. 2218, 81 L.Ed.2d 42 (1984).

In their motion for summary judgment, defendants contend that the plan descriptions fully comport with the requirements of ERISA. Defendants first note that the distinction between early retirement benefits and the deferred vested retirement benefits is specifically provided for in ERISA. Section 206(a) of ERISA provides:

> In the case of a plan which provides for the payment of an early retirement benefit, such plan shall provide that a participant who satisfied the service requirements for such early retirement benefit but separated from service... before satisfying the age requirement... is entitled upon satisfaction of such age requirement to receive a benefit not less than the benefit to which he would be entitled at the normal retirement age, actuarially reduced under regulations prescribed by the Secretary of the Treasury.

29 U.S.C. § 1056(a). This is exactly what defendants provided in the Summary.

In response to plaintiffs' argument that there has been a misrepresentation giving rise to equitable estoppel, defendants persuasively argue that there has been no misrepresentation. I agree. The Summary was written in a "manner calculated to be understood by the average plan participant," and it is sufficiently "accurate and comprehensive to reasonably apprise such participants and beneficiaries of their rights and obligations under the plan." 29 U.S.C. § 1022(a) (1). The



Summary specifically set forth the terms under which an employee would be entitled to early retirement; if he or she did not satisfy these requirements, he or she would not receive the benefit.

Furthermore, plaintiffs and the employees they represent should have been alerted to the fact that the deferred vested retirement benefit differed from the early retirement benefit even if they did not understand the concept of actuarial reduction. First, the Summary stated in clear and simple terms that an employee was eligible for early retirement only if he or she either completed thirty years of service or completed ten years of service and reached age 55 while working for Firestone. Second, the section addressing deferred vested benefits was separate from the section addressing the early retirement and was captioned "How much do you get if you should leave before retirement?"; this should have suggested to an employee that if he or she left the employ of Firestone before qualifying for an early retirement benefit, he or she would be subject to different rules. Finally, the Summary clearly provides that the deferred vested retirement benefit would be actuarially reduced from age 65 while the early retirement benefit, on the other hand, was reduced from age 62. The references to the different ages from which reductions would be made should have alerted any employee that there was a difference between the benefits. Moreover, the reduction for those less than 62 would be .4% up to age 50 while an employee, under the deferred vested benefit, could not start receiving the benefit until age 55. There is simply no basis for the argument that the May 1, 1979 Summary Plan Description did not put plaintiffs on notice that the two reductions would be different.

Similarly, I cannot accept plaintiffs' argument that the Summary was flawed because it did not include numerical examples illustrating the actuarial reduction under the deferred vested plan. Actuarial tables do change and application of the tables vary among different persons. Therefore, it may well be more misleading to include actuarial examples than to exclude them. Because I conclude as a matter of law that

there was no misrepresentation, I need not reach the issues of reliance and damages.

Plaintiffs also argue that they are entitled to the early retirement benefits because they reasonably anticipated them. In support of this contention, plaintiffs rely on *Northeast Dep't. ILGWU Health and Welfare Fund v. Teamsters Local Union No. 229*, 764 F.2d 147, 163 (3d Cir. 1985), in which the court struck down an escape clause in a benefit plan and noted that "one very important policy underlying ERISA is that employees enrolled in a benefit plan should not be deprived of compensation that they reasonably anticipate..." Plaintiffs would have me conclude, in effect, that if their interpretation of the retirement plan is reasonable and it differs from defendants', plaintiffs' interpretation should govern. I reject this analysis on two grounds. First, for the same reasons that I concluded that there was no misrepresentation in the Summary, there is no basis for plaintiffs to expect that the early retirement and deferred vested benefits would be equivalent. Second, plaintiffs' theory is inconsistent with the standard of review under which I must approach this case, i.e. the arbitrary and capricious standard. *Northeast Dep't. ILGWU*, 764 F.2d at 163. Defendants' decision must be sustained unless that decision was arbitrary and capricious. I cannot defer to plaintiffs' interpretation although it is one factor to be considered.

For all these reasons I conclude that defendants are entitled to summary judgment as to count three.

*Count five—Stock Plan*

Count five pertains to the Stock Purchase and Savings Plan ("Stock Plan"). Plaintiffs seek the vesting of their unvested interests in Firestone's contributions to the Stock Plan; they contend that they improperly suffered the forfeiture of certain stock credited to their accounts at the time of the sale of the Plastics Division. Under the terms of the Stock Plan, for every dollar an employee invested in his account, Firestone would contribute fifty cents. There was an annual accounting system whereby the money invested by Firestone would be



treated as a unit, and each unit would gradually become vested starting in year two, with full vesting occurring in year five.

If an employee was terminated, he or she was entitled to a distribution of the vested portion of his or her stock account. If termination occurred before the fifth year, the employee forfeited his or her unvested stock unless there was a termination or "partial termination" of the Stock Plan. Plaintiffs contend that the sale and closing of the Plastics Division by Firestone constituted a partial termination of the Stock Plan resulting in their shares becoming nonforfeitable. Plaintiffs also contend that the failure of the trustees of the Plan to make a specific determination that the Stock Plan would or would not be partially terminated by the sale was a breach of their fiduciary duties and arbitrary and capricious.

ERISA provides that upon complete or partial termination of a plan, "benefits accrued to the date of such... termination... are nonforfeitable." 29 U.S.C. § 411(d) (3). The Stock Plan itself provides in section 12.02:

> If the Plan is terminated, or partially terminated, or upon complete discontinuance of contributions under the Plan, the rights of all affected employees to the amounts credited to such employees' accounts at the date of termination, partial termination or discontinuance, are nonforfeitable.

Plaintiffs argue first that a partial termination of the Stock Plan occurred on November 30, 1980 making their unvested interests nonforfeitable. ERISA provides no guidance as to what constitutes "partial termination" of a plan; similarly, the Stock Plan sets forth no definition of "partial termination." Most courts when addressing this issue have looked to the IRS regulations and rulings for guidance. The Treasury regulations also do not provide a precise definition of "partial termination," but the regulations do state that whether or not a "partial termination" has occurred "will be determined on the basis of all the facts and circumstances." Treas. Reg. § 1.201-6(b) (2) (1963).

When applying these regulations, the Secretary of the Treasury has focused on whether a significant percentage of the employees covered by the plan are excluded after the event in issue. *See* Rev. Rul. 81-27, 1981-1 C.B. 228. *See also Babb v. Olney Paint Co.*, 764 F.2d 240, 242 (4th Cir. 1985); *Ehm v. Phillips Petroleum Co.*, 583 F. Supp. 1113, 1115 (D. Kan. 1984). No specific percentage has been established as the magical figure at which a partial termination occurs, and the court in *Babb* held that what constituted a significant percentage is preeminently a matter of fact. *Babb*, 764 F.2d at 242. Defendants contend, however, that a general rule has emerged that a partial termination will be found if more than thirty percent (30%) of a plan's participants are terminated. Defendants further argue that no partial termination resulted from the sale of the Plastics Division because only 228 of the 10,500 participants, or 2%, were terminated.

Defendants' position is supported by *Babb* in which the court held that no partial termination occurred when 12.4% of the employees were terminated from the plan. The court noted that the decision to sell a division and to terminate the employees was made as a business decision in light of hard economic times and not as a means to curtail benefits to employees.

In their motion for summary judgment, plaintiffs contend that I should not look solely to the percentage of employees affected; rather, I should focus on the "hard numbers" and the other facts and circumstances particular to the case. Plaintiffs rely heavily on *Weil v. Retirement Plan Administrative Comm.*, 750 F.2d 10, 12 (2d Cir. 1984), in which the court gave "great weight" to the Secretary of the Treasury's interpretation of "partial termination" but stated that the Secretary's standard was whether there had been "the dismissal of a 'significant number of employees' in connection with a major corporate event." *Id.* at 12.

In *Weil*, the court held that the lower court erred in concluding as a matter of law that there had been no partial termination and remanded for further development of the factual record. Although only 27% of the participating employees were terminated, the *Weil* court noted that when only the employees in New York City were considered, the percentage increased to 62%. Moreover, the court focused on whether a substantial number of employees were terminated rather than a substantial percentage. It is interesting to note that the plaintiffs in *Weil* were left unemployed whereas the plaintiffs in this case continued employment with the new owner.



Plaintiffs emphasize the major corporate event language in *Weil*, and argue that emphasis should be placed on the fact that there was a major corporate event in this case; an entire division, the Plastics Division, was sold. Moreover, in *Weil*, the court looked at what happened within the single market, New York City. Plaintiffs argue that such an approach in this case reveals that 100% of the employees with unvested stock contributions in the Plastics Division were terminated, supporting the view that a partial termination occurred.

Although I agree with plaintiffs that the issue of partial termination cannot be addressed by the purely mechanical application of a substantial percentage or number test, i.e., that the significant percentage or number tests are not per se determinative, I conclude that no partial termination of the Stock Plan occurred in this case. This is not a close case like that facing the court in *Weil* where 27% of all participants in the relevant plan were dismissed; here, only 2% of the participants in the Stock Plan were affected by the sale.

In *Weil*, the court remanded for the further development of the factual record; the court suggested that the district court consider not only the percentage of employees affected but also the absolute number affected as well as the circumstances surrounding the termination, i.e., the corporate event. Termination of 27% of all participants or 104 employees taken in conjunction with the closing of the entire New York City operation could make the 27% significant and constitute a partial termination. Although Firestone's sale of the Plastics Division could be termed a major corporate event, nothing in *Weil* suggests that a major corporate event without the termination of a substantial number or percentage of the

employees will constitute a partial termination. Termination of only 2% or 228 of the plan participants will simply not give rise to a partial termination. I also reject plaintiffs' suggestion that I should consider only the employees employed in the Plastics Division.

Plaintiffs also argue that defendants' action with regard to the Stock Plan was arbitrary and capricious because the Committee charged with administering the Stock Plan never considered the question of whether the sale of the Plastics Division would constitute a partial termination. Plaintiffs contend that the Committee was under an obligation to develop an evidentiary record and then make a "decision" regarding the issue of partial termination. Plaintiffs rely heavily on *Toland v. McCarthy*, 499 F. Supp. 1183 (D. Mass. 1980), in which the court reviewed the decision of the pension plan trustees denying an employee's application for a normal pension upon early retirement.

Plaintiffs' reliance on *Toland* is misplaced. *Toland* arose from a complex factual situation in which issues of plaintiff's employment history, plaintiff's coverage by a collective bargaining agreement, and inferences about his job classification were raised. In this case, the issue was much simpler and more straightforward. Only two percent of all of the Plan participants were affected by the sale. Therefore, although the sale constituted the divestment of an entire division, it was clear that no partial termination had occurred. There was no decision to be made by the Committee, and therefore, it would have been pointless for them to meet to make a "decision," let alone to develop an evidentiary record. My comments are limited to the facts of this case. Under different circumstances, e.g. a greater percentage of affected employees, the Committee might well be under an obligation to meet and make a reasoned decision. This, however, is not that case. Accordingly, I conclude that defendants are entitled to summary judgment as to count five.

*Count Six—Vacation Credit*

In count six, plaintiffs seek vesting credit for purposes of the Retirement Plan and the Stock Plan for accrued vacation



time which they had not yet taken at the time of the sale. Under the Firestone system, an employee accrued vacation time during one year which could be taken during the next fiscal year. Therefore, on October 31 of each year, an employee was notified of the amount of vacation time he or she had accrued which he or she could take during the twelve months starting November 1. The sale of the Plastics Division occurred on November 30, 1980 so many employees had accrued vacation time which they had not yet taken. Under the terms of the sale, Firestone reimbursed Occidental for the vacation pay due to the employees so they actually received the vacation time during the eleven months following the sale, but they forfeited the vacation credit for purposes of the Retirement and Stock Plans. Plaintiffs claim that Firestone violated section 202 (a) (3) (C) of ERISA, 29 U.S.C. § 1052(a) (3) (C), and 29 C.F.R. § 2530.200b-2 (a) (2) by not counting plaintiffs' accrued vacation time for purposes of computing their vested interests under the Retirement and Stock Plans.

Plaintiffs contend that the regulations require that they be credited for each hour for which they were paid by Firestone on account of a period of time during which no duties were performed for a reason such as vacation.[5] Because Fire-

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5. §2530.200b-2 Hour of service.

(a) *General rule.* An hour of service which must, as a minimum, be counted for the purposes of determining a year of service, a year of participation for benefit accrual, a break in service and employment commencement date (or reemployment commencement date) under sections 202, 203 and 204 of the Act and sections 410 and 411 of the Code, is an hour of service as defined in paragraphs (a) (1), (2) and (3) of this section. The employer may round up hours at the end of a computation period or more frequently.

(1) An hour of service is each hour for which an employee is paid, or entitled to payment, for the performance of duties for the employer during the applicable computation period.

(2) An hour of service is each hour for which an employee is paid, or entitled to payment, by the employer on account of a period of time during which no duties are performed (irrespective of whether the employment relationship has terminated) due to vacation, holiday, illness, incapacity (including disability), layoff, jury duty, military duty or leave

stone admits that it paid Occidental to provide plaintiffs with the vacation they accrued before the sale, plaintiffs contend that they are also entitled to the credit for these vacations. Plaintiffs contend that the regulations expressly state that the fact that the employment relationship has terminated makes no difference to the application of the credit regulation.

In their motion for summary judgment, defendants contend that they were justified in denying the credit on the basis of the elapsed time method of calculating credit; use of this method, defendants argue, was not arbitrary or capricious. Defendants argue that ERISA has approved two methods of calculating employee service for purposes of vesting. The first method is that upon which plaintiffs rely, hours of service. The second method is the elapsed time method under which an employee receives credit for the entire period of time that the employment relationship exists. Under this method, the starting point for crediting service is the "employment commencement date," and the end point is the date on which the employee retires, dies, quits or is discharged.

For both the Retirement Plan and the Stock Plan, Firestone uses the hours of service method to determine eligibility or participation in the Plan and the elapsed time method for determining vesting. Under the latter, plaintiffs are not entitled to credit for the vacation time they had accrued but not taken for vesting purposes under the Retirement and Stock Plans.

The elapsed time method was authorized originally by regulations promulgated by the Department of Labor and later revised and promulgated by the Treasury Department (26 C.F.R. § 1.410(a)-7) and approved by the court in *Swaida v. I.B.M. Retirement Plan,* 570 F. Supp. 482, 488 (S.D. N.Y.), *aff'd,* 728 F.2d 159 (2d Cir. 1984), *cert. denied,* 469 U.S. 874, 105 S. Ct. 232, 83 L.Ed.2d 161 (1984). In *Swaida,* plaintiff sought a judgment declaring IBM's use of the elapsed time method for computing service for vesting credit under its retirement plan, a violation of the vesting standards of ERISA.

of absence. Notwithstanding the preceding sentence. [sic]
29 C.F.R. § 2530.200b-2



The court, holding that the elapsed time regulations promulgated by the Department of the Treasury were a product of a proper exercise of its delegated authority, declined to issue such a judgment.

Similarly, I conclude that Firestone's use of the elapsed time method to determine vesting of plaintiffs' retirement benefits and stock plan accounts was neither arbitrary nor capricious. Use of this method is supported both by the legislative history and the applicable Labor and Treasury regulations. I, therefore, conclude that defendants are entitled to summary judgment as to count six.

*Count Seven–Disclosure.*

In count seven of the second amended complaint, several individual plaintiffs seek monetary relief pursuant to section 502(c) of ERISA, 29 U.S.C. § 1132(c), for violations by defendants of ERISA's disclosure requirements. Plaintiffs claim (1) that Firestone failed to comply with certain disclosure and filing obligations set forth in section 104 of ERISA, 29 U.S.C. § 1024, with regard to its Termination Pay Plan, Retirement Plan, and Stock Plan (Complaint ¶¶ 87-90), and (2) that they are entitled to discretionary damages under section 502(c) of ERISA because of Firestone's alleged failure to respond properly to their written requests for information concerning the Retirement Plan and the Stock Plan (Complaint ¶¶ 91-93). In their motion for summary judgment, plaintiffs add a claim based on Firestone's alleged failure to respond properly to written requests for information about the Termination Pay Plans; this claim had not previously been raised. I will address plaintiffs' claims *seriatim.*

First, with respect to plaintiffs' claim pursuant to section 104, 29 U.S.C. § 1024, and the so-called "automatic" disclosure and filing requirements, ERISA provides no private cause of action for monetary damages for violation of these provisions.[6] Section 502(c), 29 U.S.C. § 1132(c), sets forth the

6. Section 104(b)(4) of ERISA, 29 U.S.C. §1024(b)(4), provides:

(4) The administrator shall, upon written request of any participant or beneficiary, furnish a copy of the latest updated summary plan description, plan description, and the latest annual report, any termi-

limited remedies available to private plaintiffs for violation of ERISA's disclosure and filing requirements, and this section applies only when and if a plan administrator refuses to comply with a written request for information.[7] Accordingly, plaintiffs do not have a cause of action for damages for Firestone's alleged failure to comply with the automatic provisions. Plaintiffs apparently recognized this fact as they dropped reference to this claim in their motion for summary judgment.

The next issue is whether plaintiffs are entitled to damages pursuant to section 502(c) for Firestone's alleged failure to respond to information requests. As I noted at the outset, plaintiffs had not previously claimed that defendants had failed to comply with requests for information regarding the termination pay plans. However, because I believe that there are other grounds for denying plaintiffs' claims, I will not rely on this procedural basis for the denial.

Section 104(b)(4) of ERISA, 29 U.S.C. § 1024(b)(4), imposes a duty on a plan administrator to respond to written requests for information about the plan. However, pursuant to section 104(b)(4), the plan administrator is obligated to respond only to requests from a plan participant or beneficiary. Defendants contend that the three plaintiffs who have been identified as having made requests to which there were allegedly no adequate responses ever made, Smolinski, Schade, and Bruch, were not participants in or beneficiaries of the relevant plans at the times they made their respective requests, and therefore, were owed no responses under section 104(b)(4). Moreover, defendants contend that Smolinski, Schade, and Bruch have not established that they were harmed by the lack of response to their inquiries.

A "participant" under ERISA is "any employee or former employee ... who is or may become eligible to receive a benefit of any type from an employee benefit plan" while a "beneficiary" is "a person designated by a participant, or by the terms of an employee benefit plan, who is or may become entitled to a benefit thereunder." 29 U.S.C. § 1002(7) and (8).

Smolinski and Schade were at one time participants in the Termination Pay Plan; they could potentially have become eligible for termination pay if they were "terminated" as that term was defined for purposes of the Plan. However, because they were no longer associated with Firestone, in 1981, when they made their requests, Smolinski and Schade, would not become eligible in the future for termination pay. Similarly, as I have ruled above, plaintiffs were not presently eligible for termination pay at the time of the sale because the sale of the plants as ongoing operations did not constitute a reduction in force. In addition, both Smolinski and Schade received letters in response to their letters in which they were advised that they were not eligible for termination because they had continued employment with Occidental. I also note that plaintiff Smolinski received four detailed letters with various enclosures in response to his request for information about the Retirement Plan.

Plaintiff Bruch contends that he never received a response to his written request for information about the Stock Purchase Plan. Bruch made his request, on May 4, 1981, five months after the sale and five months after he ceased working for Firestone. Although plaintiff continued to be a partici-

nal report, the bargaining agreement, trust agreement, contract, or other instruments under which the plan is established or operated. The administrator may make a reasonable charge to cover the cost of furnishing such complete copies. The Secretary may by regulation prescribe the maximum amount which will constitute a reasonable charge under the preceding sentence.

7. Section 502(c) of ERISA, 29 U.S.C. §1132(c), provides:

(c) Administrator's refusal to supply requested information.

Any administrator who fails or refuses to comply with a request for any information which such administrator is required by this subchapter to furnish to a participant or beneficiary (unless such failure or refusal results from matters reasonably beyond the control of the administrator) by mailing the material requested to the last known address of the requesting participant or beneficiary within 30 days after such request may in the court's discretion be personally liable to such participant or beneficiary in the amount of up to $100 a day from the date of such failure or refusal, and the court may in its discretion order such other relief as it deems proper.

pant in the Retirement Plan because of his vested retirement interest, he ceased to be a participant in the Stock Plan at the time of the sale. He received distribution of his vested interest and his unvested interests were forfeited. Thus, he did not have a contingent right to "receive a benefit" from the Stock Plan after November 30, 1980.[8]

Finally, although it has not been clearly established that a plaintiff, to prevail on a claim under § 502(c) of ERISA, must establish prejudice, I believe it is relevant that plaintiffs have not presented any evidence to show that they have sustained any harm from defendants' alleged failure to respond to their requests for information. For all these reasons I do not believe that plaintiffs are entitled to an award of discretionary damages pursuant to section 502(c), and I shall enter judgment for defendants on count seven.

An appropriate order follows.

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8. Even if I had concluded that plaintiffs were entitled to have their unvested shares in the Stock Plan vested because there had been a partial termination of the Stock Plan, my conclusion with respect to Bruch's disclosure claim would not change. Bruch's rights in the Stock Plan were determined as of the date of the sale; he had no remaining interest in the Plan thereafter.



IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

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| RICHARD BRUCH, et al. | : | CIVIL ACTION |
| | : | |
| v. | : | NO. 82-3286 |
| | : | |
| FIRESTONE TIRE & RUBBER COMPANY, et al. | : | |

**ORDER**

NOW, June 9, 1986, upon consideration of the cross-motions for summary judgment, the memoranda of law submitted by the parties, the oral arguments made by counsel, and for the reasons stated in the accompanying memorandum, IT IS ORDERED that plaintiffs' motion for summary judgment is DENIED and defendants' motion for summary judgment is GRANTED. Judgment is entered in favor of defendants and against plaintiffs as to counts one, three, five, six, and seven.

/s/ Daniel H. Huyett, 3rd, Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

| | | |
|---|---|---|
| RICHARD BRUCH, et al. | : | CIVIL ACTION |
| v. | : | |
| FIRESTONE TIRE & RUBBER COMPANY, et al. | : | NO. 82-3286 |

**CIVIL JUDGMENT**

Before HUYETT, J.

AND NOW, this 9th day of June, 1986, in accordance with the order dated June 9, 1986,

IT IS ORDERED that Judgment be and the same is hereby entered in favor of the defendants and against the plaintiffs as to counts one, three, five, six and seven.

BY THE COURT:

ATTEST: /s/ Francis E. DeVine
Deputy Clerk



UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 86-1448

BRUCH, Richard, CHUBB, John R. and SCHADE, Albert and SCHOLLENBERGER, Richard and SMITH, Ronald R. and SMOLINSKI, Leonard A. In their individual capacities and as representatives of the class of former, salaried, non-union employees of the Firestone Plastics Division which was sold to the Hooker Chemical Division of the Occidental Petroleum Corporation,

*Appellants*

v.

FIRESTONE TIRE AND RUBBER COMPANY and FIRESTONE TIRE & RUBBER COMPANY RETIREMENT PLAN FOR SALARIED EMPLOYEES and FIRESTONE TIRE & RUBBER COMPANY STOCK PURCHASE AND SAVINGS PLAN,

*Appellees*

(D.C. Civil NO. 82-3286)

SUR PETITION FOR PANEL REHEARING
AND REHEARING IN BANC

PRESENT: GIBBONS, *Chief Judge,* SEITZ, WEIS, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON, MANSMANN, GREENBERG,

and SCIRICA, *Circuit Judges*, and DUMBAULD, *District Judge.*[1]

The petition for rehearing filed by appellees in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

BY THE COURT,

/s/ Edward R. Becker
Circuit Judge

DATED: Sep 25, 1987

1. The Honorable Edward Dumbauld, United States District Judge for the Western District of Pennsylvania, as to panel rehearing only.



# STATUTES AND REGULATIONS

## EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974 ("ERISA") 29 U.S.C. §§ 1001 et seq.

### Section 3, 29 U.S.C. § 1002

**§ 1002. Definitions**

For purposes of this subchapter:

. . .

(7) The term "participant" means any employee or former employee of an employer, or any member or former member of an employee organization, who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer or members of such organization, or whose beneficiaries may be eligible to receive any such benefit.

. . .

(16)(A) The term "administrator" means—

(i) the person specifically so designated by the terms of the instrument under which the plan is operated;
(ii) if an administrator is not so designated, the plan sponsor; . . .

(B) The term "plan sponsor" means (i) the employer in the case of an employee benefit plan established or maintained by a single employer, . . .

. . .

(21)(A) Except as otherwise provided in subparagraph (B), a person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other

compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan. Such term includes any person designated under section 1105(c)(1)(B) of this title.

**Section 4, 29 U.S.C. § 1003**

**§ 1003. Coverage**

(a) Except as provided in subsection (b) of this section and in sections 1051, 1081, and 1101 of this title, this subchapter shall apply to any employee benefit plan if it is established or maintained—

(1) by any employer engaged in commerce or in any industry or activity affecting commerce; or

(2) by any employee organization or organizations representing employees engaged in commerce or in any industry or activity affecting commerce; or

(3) by both.

**Section 104(b), 29 U.S.C. § 1024(b)**

**(b) Publication of summary plan description and annual report to participants and beneficiaries of plan**

Publication of the summary plan descriptions and annual reports shall be made to participants and beneficiaries of the particular plan as follows:

(1) The administrator shall furnish to each participant, and each beneficiary receiving benefits under the plan, a copy of the summary, plan description, and all modifications and changes referred to in section 1022(a)(1) of this title—

(A) within 90 days after he becomes a participant, or (in the case of a beneficiary) within 90 days after he first receives benefits, or

(B) if later, within 120 days after the plan becomes subject to this part.



The administrator shall furnish to each participant, and each beneficiary receiving benefits under the plan, every fifth year after the plan becomes subject to this part, an updated summary plan description described in section 1022 of this title which integrates all plan amendments made within such five-year period, except that in a case where no amendments have been made to a plan during such five-year period, this sentence shall not apply. Notwithstanding the foregoing, the administrator shall furnish to each participant, and to each beneficiary receiving benefits under the plan, the summary plan description described in section 1022 of this title every tenth year after the plan becomes subject to this part. If there is a modification or change described in section 1022(a)(1) of this title, a summary description of such modification or change shall be furnished not later than 210 days after the end of the plan year in which the change is adopted to each participant, and to each beneficiary who is receiving benefits under the plan.

(2) The administrator shall make copies of the plan description and the latest annual report and the bargaining agreement, trust agreement, contract, or other instruments under which the plan was established or is operated available for examination by any plan participant or beneficiary in the principal office of the administrator and in such other places as may be necessary to make available all pertinent information to all participants (including such places as the Secretary may prescribe by regulations).

(3) Within 210 days after the close of the fiscal year of the plan, the administrator shall furnish to each participant, and to each beneficiary receiving benefits under the plan, a copy of the statements and schedules, for such fiscal year, described in subparagraphs (A) and (B) of section 1023(b)(3) of this title and such other material as is necessary to fairly summarize the latest annual report.

(4) The administrator shall, upon written request of any participant or beneficiary, furnish a copy of the latest updated summary plan description, plan description, and the latest annual report, any terminal report, the bargaining agreement,

trust agreement, contract, or other instruments under which the plan is established or operated. The administrator may make a reasonable charge to cover the cost of furnishing such complete copies. The Secretary may by regulation prescribe the maximum amount which will constitute a reasonable charge under the preceding sentence.

## Part 4—Fiduciary Responsibility

## Section 401(a), 29 U.S.C. § 1101(a)

### § 1101. Coverage

(a) This part shall apply to any employee benefit plan described in section 1003(a) of this title (and not exempted under section 1003(b) of this title), other than —

(1) a plan which is unfunded and is maintained by an employer primarily for the purpose of providing deferred compensation for a select group of management or highly compensated employees; or

(2) any agreement described in section 736 of title 26, which provides payments to a retired partner or deceased partner or a deceased partner's successor in interest.

## Section 404(a)(1), 29 U.S.C. § 1104(a)(1)

### § 1104. Fiduciary duties

### (a) Prudent man standard of care

(1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;



(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances, it is clearly prudent not to do so; and

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter or subchapter III of this chapter.

## Section 406(b), 29 U.S.C. § 1106(b)

### § 1106. Prohibited transactions

. . .

### (b) Transactions between plan and fiduciary

A fiduciary with respect to a plan shall not—

(1) deal with the assets of the plan in his own interest or for his own account,

(2) in his individual or in any other capacity act in any transaction involving the plan on behalf of a party (or represent a party) whose interests are adverse to the interests of the plan or the interests of its participants or beneficiaries, or

(3) receive any consideration for his own personal account from any party dealing with such plan in connection with a transaction involving the assets of the plan.

**Section 408(c), 29 U.S.C. § 1108(c)**

**§ 1108. Exemptions from prohibited transactions**

. . .

**(c) Fiduciary benefits and compensation not prohibited by section 1106**

Nothing in section 1106 of this title shall be construed to prohibit any fiduciary from—

(1) receiving any benefit to which he may be entitled as a participant or beneficiary in the plan, so long as the benefit is computed and paid on a basis which is consistent with the terms of the plan as applied to all other participants and beneficiaries;

(2) receiving any reasonable compensation for services rendered, or for the reimbursement of expenses properly and actually incurred, in the performance of his duties with the plan; except that no person so serving who already receives full-time pay from an employer or an association of employers, whose employees are participants in the plan, or from an employee organization whose members are participants in such plan shall receive compensation from such plan, except for reimbursement of expenses properly and actually incurred; or

(3) serving as a fiduciary in addition to being an officer, employee, agent, or other representative of a party in interest.

**Section 502(c), 29 U.S.C. § 1132(c)**

**(c) Administrator's refusal to supply requested information**

Any administrator who fails or refuses to comply with a request for any information which such administrator is required by this subchapter to furnish to a participant or beneficiary (unless such failure or refusal results from matters



reasonably beyond the control of the administrator) by mailing the material requested to the last known address of the requesting participant or beneficiary within 30 days after such request may in the court's discretion be personally liable to such participant or beneficiary in the amount of up to $100 a day from the date of such failure or refusal, and the court may in its discretion order such other relief as it deems proper.

**LABOR MANAGEMENT RELATIONS ACT ("LMRA")**
**29 U.S.C. §§ 141 et seq.**

**Section 302, 29 U.S.C. § 186**

**§ 186. Restrictions on financial transactions**

**(a) Payment or lending, etc., of money by employer or agent to employees, representatives, or labor organizations**

It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, adviser, or consultant to an employer or who acts in the interest of an employer to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value—

(1) to any representative of any of his employees who are employed in an industry affecting commerce; or

(2) to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce; . . .

. . .

**(c) Exceptions**

The provisions of this section shall not be applicable . . . (5) with respect to money or other thing of value paid to a

trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents): *Provided,* That (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance; (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such fund, together with such neutral persons as the representatives of the employers and the representatives of employees may agree upon and in the event the employer and employee groups deadlock on the administration of such fund and there are no neutral persons empowered to break such deadlock, such agreement provides that the two groups shall agree on an impartial umpire to decide such dispute, or in event of their failure to agree within a reasonable length of time, an impartial umpire to decide such dispute shall, on petition of either group, be appointed by the district court of the United States for the district where the trust fund has its principal office, and shall also contain provisions for an annual audit of the trust fund, a statement of the results of which shall be available for inspection by interested persons at the principal office of the trust fund and at such other places as may be designated in such written agreement; and (C) such payments as are intended to be used for the purpose of providing pensions or annuities for employees are made to a separate trust which provides that the funds held



therein cannot be used for any purpose other than paying such pensions or annuities.

## LABOR DEPARTMENT REGULATION
## 29 C.F.R. § 2510.3-3(d)

(d) *Participant covered under the plan.*

(1)(i) An individual becomes a participant covered under an employee welfare benefit plan on the earlier of—

(A) the date designated by the plan as the date on which the individual begins participation in the plan;

(B) the date on which the individual becomes eligible under the plan for a benefit subject only to occurrence of the contingency for which the benefit is provided; or

(C) the date on which the individual makes a contribution to the plan, whether voluntary or mandatory.

(ii) An individual becomes a participant covered under an employee pension plan—

(A) in the case of a plan which provides for employee contributions or defines participation to include employees who have not yet retired, on the earlier of—

(*1*) the date on which the individual makes a contribution, whether voluntary or mandatory, or

(2) the date designated by the plan as the date on which the individual has satisfied the plan's age and service requirements for participation, and

(B) in the case of a plan which does not provide for employee contribution and does not define participation to include employees who have not yet retired, the date on which the individual completes the first year of employment which may be taken into account in determining—

(*1*) whether the individual is entitled to benefits under the plan, or

(2) the amount of benefits to which the individual is entitled, whichever results in earlier participation.

(2)(i) An individual is not a participant covered under an employee welfare plan on the earliest date on which the individual—

(A) is ineligible to receive any benefit under the plan even if the contingency for which such benefit is provided should occur, and

(B) is not designated by the plan as a participant.

(ii) An individual is not a participant covered under an employee pension plan or a beneficiary receiving benefits under an employee pension plan if—

(A) the entire benefit rights of the individual—

(*1*) are fully guaranteed by an insurance company, insurance service or insurance organization licensed to do business in a State, and are legally enforceable by the sole choice of the individual against the insurance company, insurance service or insurance organization; and

(*2*) a contract, policy or certificate describing the benefits to which the individual is entitled under the plan has been issued to the individual; or

(B) the individual has received from the plan a lump-sum distribution or a series of distributions of cash or other property which represents the balance of his or her credit under the plan.

(3)(i) In the case of an employee pension benefit plan, an individual who, under the terms of the plan, has incurred a one-year break in service after having become a participant covered under the plan, and who has acquired no vested right to a benefit before such break in service, is not a participant covered under the plan until the individual has completed a year of service after returning to employment covered by the plan.

(ii) For purposes of paragraph (d)(3)(i) of this section, in the case of an employee pension benefit plan which is subject to section 203 of the Act the term "year of service" shall have the same meaning as in section 203(b)(2)(A) of the Act and any regulations issued under the Act and the term "one-year break in service" shall have the same meaning as in section 203(b)(3)(A) of the Act and any regulations issued under the Act.